Supreme Court, U.S.
FILED
(2)
991278 JAN 25 2000
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ROGER DALE JUNTUNEN, NATURAL FATHER
Petitioner

v.

MARK VANCE WAGNER, STEP FATHER,
AND THE STATE OF OHIO, ET. AL.

On Petition For Writ of Certiorari
To The Eleventh District Court of Appeals of Ohio

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Roger Dale Juntunen
Pro Se
649 Lloyd Street
Hubbard, Ohio 44425
(330) 534-8948

1880

Table of Contents

Appendix to Petition for Writ of Certiorari to the Eleventh District Court of Appeals of Ohio

I. Opinions and orders entered in conjunction with the judgments sought to be reviewed (Rule 14.1(i)(i)) 1

II. Other relevant opinions and orders entered in the case by courts (Rule 14.1(i)(ii)) 78

III. Material required by Rule 14.1(f) or Rule 14.1(g)(i) (Rule 14.1(i)(v)) 147

IV. Other material essential to understand the petition (Rule 14.1(i)(vi)) 167

APPENDIX

(OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW ENTERED IN CONJUNCTION WITH THE JUDGMENTS SOUGHT TO BE REVIEWED:)

(Cite as: 1999 WL 700615 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In re: The ADOPTION of Emily Anna WAGNER. No. 97-T-0223.

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT, TRUMBULL COUNTY Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 94 ADP 057.

Roger D. Juntunen, Hubbard, OH, for Respondent-Appellant. Atty. Elise M. Burkey, Warren, OH, for Petitioner-Appellee/Mark V. Wagner.

JUDGMENT: Reversed and remanded.

FORD, P.J., CHRISTLEY and O'NEILL, JJ.

OPINION

FILED COURT OF APPEALS JUL 1, 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk.

ONEILL., J.

The following is an appeal from an ongoing process involving the adoption of a child, Emily (d.o.b.9/8/89), by her stepfather, appellee, Mark V. Wagner ("appellee"). In the current appeal, appellant, Roger Juntunen ("appellant"), Emily's natural father, alleges error in the trial court's determination that the best interest of the child would be served by permitting the adoption and permanently terminating his parental rights. Based on errors below that pre-

vented appellant from fully participating at the hearing held to determine the best interest of the child, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

The facts pertinent to this appeal are as follows. On June 23, 1994, appellee filed a petition in the Probate Division of the Trumbull County Court of Common Pleas seeking to adopt his two stepchildren, Benjamin (d.o.b.3/21/87) and Emily. By way of background, appellee's wife, Deborah Wagner (f.k.a.Juntunen), was previously married to appellant and two children, Benjamin and Emily, were born as issue to this marriage. On July 15, 1991, the children's natural parents were granted a decree of dissolution in the state of Indiana. Ms. Wagner was designated the residential parent and appellant, with an income potential exceeding $35,000 per year, was ordered to pay $150 per week in child support. On December 31, 1991, Ms. Wagner married appellee, and since that date, the children have resided with appellee and their mother.

In his petition, appellee alleged that appellant's consent to the adoption was unnecessary because, pursuant to R.C. 3107.07, appellant failed without justifiable cause to communicate and/or provide support for his children for the one-year period immediately preceding the filing of his petition. At a hearing held on the issue of whether appellant's consent was needed for the adoption to proceed, evidence was presented that appellant rarely visited his children and failed to satisfy his court ordered support payments. For the one- year period immediately preceding the filing of appellee's adoption petition, June 23, 1993 to June 23, 1994, appellant saw his children four times for a total of approximately three hours. During the same twelve-month period, appellant paid a total of $329.40 in child support.

By judgment entry filed March 22, 1995, the trial court determined that appellant's consent to the adoption was not necessary. The trial court based its decision on appellant's failure, without justifiable cause, to support his children above the mere $329.40 that was paid. The trial court's judgment entry did not address appellee's contention that appellant failed to communicate with the

children and this was not a factor in the trial court's determination at this phase of the adoption proceedings. This court affirmed the trial court's decision in In re Adoption of Wagner (1997), 117 Ohio App.3d 448, 690 N.E.2d 959, and a discretionary appeal to the Supreme Court of Ohio was not allowed in (1997), 78 Ohio St.3d 1516, 679 N.E.2d 311.

Following the proceedings which determined that the adoption process could occur without appellant's consent, the trial court scheduled a hearing to determine the best interest of the child. Prior to this hearing, and pursuant to R.C. 3107.12, a caseworker from the Trumbull County Children Services Board, Annette Weimer, submitted to the court confidential reports containing her assessment of appellee and the children. The reports contained no assessment of the relationship between Emily and her natural father, appellant.

On September 30, 1997, the trial court conducted a hearing on appellee's adoption petition to determine the best interest of the children. Annette Weimer testified as to her findings contained within the confidential reports she previously filed with the trial court. She described appellee as an easygoing, hardworking person who provided adequate income for his family's financial needs. She found the Wagner home to be adequately furnished with excellent housekeeping standards. Personal references submitted to the Board were all positive toward appellee and he was described as a loving father who exhibited genuine concern and affection for the children.

As for the children, Ms. Weimer described them as "anxious" to be adopted by appellee and, in fact, were already using the Wagner name in church and school. The children were described as developing normally and were involved in activities typical for their age at both church and school. Ms. Weimer testified that the children share a close relationship with appellee, who they refer to as "Dad." By contrast, Ms. Weimer testified that the children do not share a close relationship with appellant and that their memories of him are not positive. Ms. Weimer opined that the adoption of Emily and Benjamin by appellee was in the best interest of the

child.

On cross-examination, Ms. Weimer acknowledged that she did not question appellant, despite his availability, before submitting her assessments to the court regarding appellee's requested adoptions. She further acknowledged that she was not aware, and did not factor into her best interest determination, instances where Ms. Wagner was found in contempt for interfering with appellant's visitation rights in the past.

Appellant also attempted to question Ms. Weimer regarding the children's poor opinion of him, and, specifically, the possibility that they suffered from "Parental Alienation Syndrome" as a result of brainwashing brought about by appellee and/or Ms. Wagner. Ms. Weimer testified that she was not familiar with this particular theory, however, she stated that she interviewed the children alone and did not believe they had been coached as to what to say during their interview with her.

Both appellee and Ms. Wagner testified as to appellee's willingness to raise the children and the lack of involvement that appellant has had in his children's development. Ms. Wagner described how, in many respects, appellee is the only father that the children have known. She testified that the children were eager to have the adoption become official and described a circumstance when one of the children, who was selected to receive an award at school, became upset about being announced to the class as a "Juntunen" and not a "Wagner."

Ms. Wagner denied that she told the children what to say about their natural father when they were interviewed by Ms. Weimer. She further denied that she prohibited appellant from interacting with the children. However, on cross-examination appellant challenged Ms. Wagner's credibility as to this point by questioning her with a prior judgment issued from the Domestic Relations Division of the Trumbull County Court of Common Pleas, which held that she "willfully denied [appellant] his visitation" on at least two occasions in the spring of 1995.

Ms. Wagner further testified that both students receive straight "A's" on their report cards and participate in numerous activities at church and school. Appellee's father, Clyde R. Wagner, testified as to his willingness to accept Benjamin and Emily as his grandchildren and described many of the activities that the children participate in during their visits with him.

In response to the evidence presented by appellee as to the best interest of the children, appellant argued that he has tried to be a part of his children's lives as much as possible. However, he accused Ms. Wagner of engaging in a pattern of activity to inhibit him from fostering a relationship with his children.

Appellant testified that he resides less than ten minutes away from his children where he lives with his current spouse, Jane Spies, and their daughter, Sarah (d.o.b.12/3/95). Despite his family's close proximity to Benjamin and Emily, appellant asserts that Ms. Wagner has thwarted his attempts to visit with his children. Appellant attempted to present, with varying degrees of success, evidence of specific instances where Ms. Wagner prevented him from seeing his children. Ms. Spies confirmed that her husband attempted to enforce his visitation rights every weekend, but was usually prevented from exercising those rights based on the actions of Ms. Wagner.

Ms. Spies also testified that she received a bachelor's degree in psychology and a master's in guidance and counseling. She further stated that she has taken Ph.D. level course work in counseling and psychology and expressed some familiarity with "Parental Alienation Syndrome." Based on her observations of the times appellant was permitted to exercise his visitation rights, Ms. Spies stated that the children acted lovingly toward their natural father as well as their new baby sister. She saw no indication that the children wanted to end their relationship with appellant. To the extent that the children may have reported that they now want no contact with their father, Ms. Spies opined that the children had been programmed or "brainwashed" into saying these things by Ms. Wagner and/or appellee.

At the hearing, appellant admitted that he was behind in his child support payments and did not deny Ms. Wagner's estimate that he was in arrears more than $40,000. He also did not deny that appellee was adequately providing for the needs of the children. However, appellant claimed that he now holds a steady job that would permit him to pay his child support obligation. He also expressed a desire to do anything for his children and attempted to elicit evidence as to his ability to care for the children during time periods when he exercised his visitation rights. Both he and Ms. Spies believed that the children would face irreparable harm if the court permanently terminated appellant's parental rights and failed to foster the children's relationship with both sets of parents.

On November 5, 1997, the trial court issued its decision highlighting the testimony as presented by appellee in this matter and concluded that the adoption of Emily by her stepfather was in her best interest. From this judgment, appellant filed a timely notice of appeal and now asserts the following nine assignments of error:

"[1.] The granting of the adoption is contrary to law, against the manifest weight of the evidence, and an abuse of judicial discretion where the trial court restricts appellant's relevant 'best interest' testimony and evidence to the one year prior to the filing of the adoption petition, in violation of Ohio Revised Code 3107.161(B), where Ohio Revised Code 3107.07(A) does not apply.

"[2.] The granting of the adoption is unconstitutional and violates the separation of church and state and the equal protection clause of the United States Constitution where the judgment entry is based on testimony that: 'both children ... already use the last name Wagner in church', 'Mr. Wagner is active ... in church activities with them', 'the family attends church together regularly', 'the children have had perfect attendance in Sunday school for the last three years', and 'the extended family extends church and gathers together every Sunday for dinner.'

"[3.] The granting of the adoption without 'notice of filing' and 'proof of service' of the state-initiated 'Report on Proposed

Adoption; or the "ODHS Prefinalization Report' and without admission of said reports into evidence at the 'best interest' hearing subject to cross-examination by the appellant, is unconstitutional and violates the appellant's civil liberties as a parent and due process rights under the Fourteenth Amendment.

"[4.] The exclusion of appellant from the state-initiated investigation and subsequent 'Report on Proposed Adoption' and 'ODHS Prefinalization Report' is unconstitutional and violates the appellant's liberty interest in the maintenance of the parent-child relationship and due process rights under the Fourteenth Amendment.

"[5.] The de facto termination of the appellant's parent-child relationship via the granting of an adoption under the 'best interest' standard without the consent of the appellant and without a prior legal termination of the appellant's parental rights is unconstitutional and a violation of the appellant's civil liberties as a parent and due process rights under the Fourteenth Amendment of the United States Constitution.

"[6.] The granting of an adoption based on the prior fraudulent and illegal use of the 'Wagner' last name is fraudulent, contrary to law, unconscionable, and abuse of judicial discretion.

"[7.] Ohio Revised Code 3107.07(A) is unconstitutional because it is too vague and forces judges to use personal subjective values resulting in arbitrary legislation of the judiciary which violates the appellant's due process and equal protection rights under the Fourteenth Amendment.

"[8.] The granting of the adoption is fraudulent, contrary to law, and against the manifest weight of the evidence where the natural mother committed the crime of perjury under oath at the 'best interest' hearing and said perjury is material to the 'best interest' determination regarding contempt findings against her for failure to provide lawful visitation and regarding her compliance with a court ordered psychological evaluation to determine 'best interest' of the child and attend family counseling with Dr. Douglas Darnall, Ph.D.

"[9.] The granting of the adoption is against the manifest weight of the evidence and contrary to law where the judgment entry does not independently consider all relevant factors related to the 'best interest' of the child in a contested adoption required by Ohio Revised Code 3107.161(B)."

For ease of disposition of this appeal, we will address the above assignments of error in an order different from that presented by appellant. Generally speaking, we will attempt to address appellant's assignments of error in the following order: arguments appellant raises regarding the necessity of his consent to the adoption; alleged errors in the trial court's reliance on evidence submitted by appellee in support of his petition for adoption; and alleged restrictions placed on appellant's attempt to present evidence concerning the best interest of the child determination.

In the fifth assignment of error, appellant claims that the trial court erred in terminating his parental relationship with his children based solely on the best interest determination without a "judicial finding of mental unfitness, neglect, abuse, or other legal reason to terminate [his] rights." However, appellant's argument is a mischaracterization of the history surrounding appellee's adoption petition.

An adoption proceeding involves a two-step process consisting of a "consent" phase and a "best interest" phase. See, e.g., In re Adoption of Jordan (1991), 72 Ohio App.3d 638, 645, 595 N.E.2d 963; In re Janoske (Nov. 22, 1991), Geauga App. No. 90-G-1589, unreported, at 3. Previously, the trial court determined by clear and convincing evidence that appellant, without justifiable cause, failed to adequately support his children for the one-year period immediately preceding the filing of appellee's adoption petition. This determination, equating to a finding of legal abandonment of the children by appellee, was upheld on appeal. Following the appellate process, the trial court turned to the second phase of the adoption process, the "best interest" phase.

As a result of the trial court's adherence to the two-step adoption process, the constitutional arguments appellant raises as to the

termination of his parental rights "via a best interest hearing only" are patently false. Appellant's fifth assignment of error is devoid of merit.

Turning to appellant's seventh assignment of error, appellant attempts to argue that the consent phase of the adoption process, conducted pursuant to R.C. 3107.07(A), is unconstitutional. Specifically, appellant argues that R.C. 3107.07(A) fails to set forth a statewide minimum that a natural parent must pay toward their child support obligation in order to preserve their parental rights.

As discussed in appellant's fifth assignment of error, the consent phase of the adoption process in this matter has been concluded, and appellant's arguments as to the unfairness of the trial court's determination as to that issue has survived the appellate process. We will not discuss those arguments again in the current appeal. Pursuant to the doctrines of res judicata and/or the "law of the case," appellant is prohibited from raising errors in a subsequent action that should have been raised or were already decided in the prior action. See, e.g., National Amusements, Inc. v. Springdale (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178; Nolan v. Nolan (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410. Appellant's seventh assignment of error is without merit.

In the next set of arguments, appellant raises several assignments of error with respect to the trial court's reliance on evidence presented by appellee in support of his petition for adoption. In the second assignment of error, appellant asserts that the "theme" of the trial court's decision to grant the adoption petition centered upon appellee's participation in church related activities with the children. Appellant argues that the court's repeated reference to these activities in its judgment entry amounts to a violation of his First Amendment Rights and the separation between church and state.

Appellant also alleges that the trial court's "best interest" determination is contrary to law because the decision relied on fraudulent evidence attributed to Ms.Wagner as part of her continued attempt

to alienate the children from him. Specifically, appellant claims in the sixth assignment of error that appellee has illegally used the name "Wagner" as the children's surname, and, in the eighth assignment of error, argues that he established that Ms. Wagner lied at the hearing regarding her repeated interference with his visitation rights.

Adoption matters are decided on a case-by-case basis through the exercise of the discretion granted a trial court to determine matters such as the best interest of the child. In re Adoption of Charles B (1990), 50 Ohio St.3d 88, 90, 552 N.E.2d 884. Moreover, it is primarily the responsibility of the trial court to weigh the testimony presented before it and determine the credibility of the witnesses. See, e.g., Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 23, 550 N.E.2d 178.

In reviewing the trial court's judgment entry, however, it is evident that the only "theme" underlying the court's decision is the uncontroverted fact that appellee has shouldered, for whatever reason, the responsibility of caring for appellant's children since 1991. As the court noted in its entry, it is appellee that the children refer to as their father, it is appellee that participated in their important events, such as church and school related activities, and it is appellee who has provided for the children's financial and emotional needs.

The fact that the trial court mentioned the word "church" in its judgment entry to help describe some of the activities appellee engaged in with the children does not amount to a violation of appellant's First Amendment Rights. The trial court's reference to church activities is not an endorsement of religious activity. Rather, it is used as an example of a type of activity which apparently is important to the children and the Wagners. The trial court judgment did not rely, as argued by appellant, on any "illegal" or "unconstitutional" basis. Moreover, this court refuses to interfere with the lower court's determinations regarding the credibility of the witnesses and its resolutions of factual disputes as argued in these assignments of error. Appellant's second, sixth, and eighth assignments of error are without merit. We recognize that appellant is understandably upset at the fact that appellee has

become the children's central father figure. We further recognize the pain appellant must feel to hear the characterization that his children want nothing to do with him and fear ridicule from their classmates when referred to as a "Juntunen" and not a "Wagner." However, appellee's willingness to care for appellant's children, both financially and emotionally, as well as the children's acceptance of their stepfather are facts that appellant did not dispute at trial. Based on the evidence submitted to the court, at this point, a very strong case has been made for why the best interest of the child would be served by the court's granting of appellee's adoption petition.

Appellant did not attack appellee's adoption petition by questioning appellee's ability to care for his children. Instead, appellant focused his arguments on why he has not played a part in his children's lives and the reasons for his children's poor opinion of him. Appellant alleged that he has always expressed a willingness to play a role in the children's development, but has been denied that chance based on his former wife's continued attempts to alienate the children from him. While appellee no doubt disputes appellant's claimed willingness to be a consistent means of support to the children, both financially and emotionally, we do share some of appellant's concerns, as expressed in his remaining assignments of error, regarding his ability to have his arguments heard by the trial court.

In the third and fourth assignments of error, appellant alleges error with respect to assessments filed by Ms. Weimer to the trial court concerning appellee's petition for adoption. Appellant asserts that he was never notified that the assessments of appellee and the children were being performed and was never given an opportunity to participate in the investigations. He further asserts that he was never given a copy of the reports filed in the court and had no way to question the information provided by Ms. Weimer.

R.C. 3107.031 states, in pertinent part that:

"An assessor shall conduct a home study for the purpose of ascertaining whether a person seeking to adopt a minor is suitable

to adopt. A written report of the home study shall be filed with the court at least ten days before the petition for adoption is heard.

"The report shall contain the opinion of the assessor as to whether the person who is the subject of the report is suitable to adopt a minor and other information and documents specified in rules adopted by the department of human services * * *.

"On request, the assessor shall provide the person seeking to adopt a copy of the report of the home study. The assessor shall delete from that copy any provisions concerning the opinion of other persons, excluding the assessor, of the person's suitability to adopt a minor."

In addition to the home study report, R.C. 3107.12 required that an assessment also be made of the petitioner and the child. [FN1] R.C. 3107.12 provided, in pertinent part, as follows:

FN1. Since the trial court's hearing on the best interest of the child has been revised, effective August 5, 1998, no longer requiring a prefinalization assessment to be conducted if the petitioner is the child's stepparent. Under the new statute, the trial court may order that an assessor conduct a prefinalization assessment if the report is deemed in the child's best interests. See revised R.C. 3107.12(B).

"An assessor shall conduct a prefinalization assessment of a minor and petitioner before a court issues a final decree of adoption or finalizes an interlocutory order of adoption for the minor. On completion of the assessment, the assessor shall prepare a written report of the assessment and provide a copy of the report to the court before which the adoption petition is pending.

"The report of a prefinalization assessment shall include all of the following:

"(A) The adjustment of the minor and the petitioner to the adoptive placement;

"(B) The present and anticipated needs of the minor and the petitioner, * * *;

"(C) The physical, mental, and developmental condition of the minor;

"(D) If known, the minor's biological family background, including identifying information about the biological or other legal parents;

"(E) The reasons for the minor's placement with the petitioner, the petitioner's attitude toward the proposed adoption, and the circumstances under which the minor was placed in the home of the petitioner;

"(F) The attitude of the minor toward the proposed adoption, if the minor's age makes this feasible;

" * * * ."

While R.C. 3107.031 and former R.C. 3107.12 mandate that assessments be made of the petitioner, the petitioner's home, and the child, there are no requirements as to how these investigations should be conducted. As the Fourth District Court of Appeals stated in In re Adoption of Howell (1991), 77 Ohio App.3d 80, 93, 601 N.E.2d 92:

"The statute does not differentiate the type of investigation that should be conducted for different types of adoptions. Logically, if parents have surrendered a child for adoption and both parents have sought to have their child adopted, there may not be a need to contact the natural parents of the child. However, in a contested adoption proceeding, it is difficult to see how the child's best interest may properly be determined if the investigator has only inquired as to the condition of the petitioners and the child."

In the case sub judice, we agree with appellant's assertion that he was not permitted to participate in the creation of Ms. Weimer's

reports to the trial court. R.C. 3107.12(B) provided that the assessor shall, if known, include information in the assessment regarding the child's biological family background. Despite appellant's availability to participate in the assessment, Ms. Weimer wrote "N/A" when she came to this section of her report regarding the biological family.

We are deeply concerned at the way the prefinalization report was prepared in this matter. Aside from the mandatory language utilized by the legislature, the information provided under former R.C. 3107.12(D) can be vital, particularly in a circumstance where an adoptive child may begin experiencing unexplained physiological or psychological problems. See factual situation in Burr v. Stark Cty. Bd. of Commrs. (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101. Relevant to this matter, Ms. Weimer's failure to contact appellant also gives the impression that his thoughts as to the adoption do not matter and ends up providing the court with a rather one-sided account as to why appellee's petition for adoption should be granted.

As to appellant's ability to receive a copy of Ms. Weimer's reports, we would note that he failed to afford himself of the protections provided in R.C. 3107.17(B) that permit the disclosure of the information he seeks upon the consent of the court. See In re Adoption of Dervenis (Dec. 28, 1995), Franklin App. No. 95APF07-869, unreported. We further note that Ms. Weimer was called to testify at the best interest hearing where she conveyed the results of her assessments and faced cross-examination from appellant regarding any shortcomings in the process she utilized in compiling her assessments for the court. As indicated by appellant, this cross-examination revealed that Ms. Weimer never contacted appellant as she was compiling her evaluations, and, thus, her recommendations concerning the best interest of the children did not consider appellant's views on the adoption.

Despite the shortcomings in Ms. Weimer's report, we cannot agree with appellant's assertion that he was prejudiced by the report, particularly in a circumstance, such as this one, where the assessor was subject to cross-examination, and, as will be discussed in the

next assignment of error, appellant has or will be given an opportunity to present evidence to counter the findings submitted in the assessor's report. See Howell, 77 Ohio App.3d at 91, 601 N.E.2d 92; In re Adoption of Aiken (Mar. 30, 1992), Montgomery App. No. 12522, unreported. Appellant's third and fourth assignments of error are without merit.

This leads us to appellant's first assignment of error, and the allegations that the trial court improperly limited the evidence he wished to present in opposition to appellee's petition for adoption. Specifically, appellant cites to a number of instances in the record where the trial court limited his presentation of evidence to the one-year period immediately preceding the filing of appellee's adoption petition.

In dealing with a pro se litigant, it is evident that the trial court attempted to grant appellant as much latitude as possible in his presentation of his case. However, a review of the record confirms appellant's claims that the trial court limited his presentation to those facts that occurred within the one-year-time period immediately preceding the filing of appellee's petition. The restrictions to appellant's presentation typically occurred when appellant sought to question Ms. Wagner regarding her willingness to grant him visitation rights as well as evidence concerning the suitability of his home when the children are permitted to come and visit with him. Specifically, the trial court's comments included the following:

"Q: (By Mr. Juntunen to Ms. Wagner) In 1995, for instance on September 29th, 1995, did you allow me my lawful visitation with Benjamin and Emily?

"(By appellee's counsel): I'm going to note a continuing objection as to the relevancy.

"BY THE COURT: I'm going to sustain the objection. The issue here, as I've indicated, is the best interest of the children. The time frame that we're concerned about is the year immediately preceding the filing of the petition for—or in close proximity to that time

frame. The petition, as I have indicated, was filed on June 23, 1994. So, we're concerned with the period of time from June of '93 to June of '94. If there are any relevant factors around that time period, the Court may consider that as well."

While R.C. 3107.07(A) limited the "consent" phase of this adoption proceeding to the time period consisting of the year immediately preceding the filing of appellee's adoption petition, there is no such restriction in the determination of the best interest of the child. The very fact that the trial court had to consider a prefinalization report prior to issuing a final decree of adoption establishes that the court must consider evidence outside of the one-year time period referenced in R.C. 3107.07(A).

In determining the best interest of the child, R.C. 3107.161 provides:

"(A) As used in this section, 'the least detrimental available alternative' means the alternative that would have the least long-term negative impact on the child.

"(B) When a court makes a determination in a contested adoption concerning the best interest of a child, the court shall consider all relevant factors including, but not limited to, all of the following:

"(1) The least detrimental available alternative for safeguarding the child's growth and development;

"(2) The age and health of the child at the time the best interest determination is made and, if applicable, at the time the child was removed from the home;

"(3) The wishes of the child in any case in which the child's age and maturity makes this feasible;

"(4) The duration of the separation of the child from a parent;
"(5) Whether the child will be able to enter into a more stable and permanent family relationship, taking into account the conditions

of the child's current placement, the likelihood of future placements, and the results of prior placements;

"(6) The likelihood of safe reunification with a parent within a reasonable period of time;

"(7) The importance of providing permanency, stability, and continuity of relationships for the child;

"(8) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

"(9) The child's adjustment to the child's current home, school, and community;

"(10) The mental and physical health of all persons involved in the situation;

"(11) Whether any person involved in the situation has been convicted of, pleaded guilty to, or accused of any [relevant] criminal offense * * *.

"(C) A person who contests an adoption has the burden of providing the court material evidence needed to determine what is in the best interest of the child and must establish that the child's current placement is not the least detrimental available alternative." (Emphasis added.)

Unlike R.C. 3107.07(A), R.C. 3107.161 does not contain a one-year restriction from which to consider evidence. Thus, it was improper for the trial court to restrict appellant's evidence at the "best interest" phase to this time period. Appellant's first assignment of error has merit.

Throughout these proceedings, appellant has expressed his desire to do everything in his power to prevent the permanent termination of his parental rights. He has done this for the stated purpose of letting his children know that he did not permit the adoptions to

occur without a fight. While appellant's statements are admirable, they are clearly in conflict with his continued practice of failing to provide financial and emotional support for his children. However, appellant submits that he can prove that any shortcomings he has had as a father are not his fault and that the children's best interest would be served by the court fostering a relationship between the children and both sets of families. The law requires the court to come up with the "least detrimental alternative."

Based on the restrictions that were placed on appellant's presentation of his case, on remand appellant shall have an opportunity to present to the trial court any additional evidence relevant to the best interest determination. This determination may include appellant's development of his theory that the children suffer from "Parental Alienation Syndrome" as a result of Ms. Wagner's past actions. We will warn appellant, however, that he is treading on very thin ice and we strongly recommend that he retain counsel. If he has actual evidence that the children suffer from "Parental Alienation Syndrome" and could develop a meaningful relationship with the Juntunen family, appellant needs to now present that evidence to the trial court in a way that conforms to the Ohio Rules of Evidence and Procedure. On remand, appellee should also be given an opportunity to respond to any evidence submitted by appellant if he so desires.

We remind appellant that the trial court's determination will be made on the evidence that was admitted at the prior hearing and the relevant evidence that will properly be admitted as a result of our remand. The subjective desires of appellant will not suffice to meet his burden to present evidence that the adoption of the children by their stepfather is not the least detrimental alternative available.

As a result of our determination regarding appellant's first assignment of error, appellant's arguments concerning the trial court's consideration of all relevant factors in its judgment entry are moot. Based on the foregoing, the judgment of the trial court is reversed and this matter is remanded for further proceedings consistent with this opinion. All pending motions currently before this court are

hereby overruled as moot. It is the further order of this court that the parties equally share the costs of this proceeding.

/s/ JUDGE WILLIAM M. O'NEILL

FORD, P.J., concurs with the first, second, fifth, sixth, eighth, and ninth assignments of error; concurs in judgment only as to the seventh assignment of error; dissents on the third and fourth assignments of error with Concurring/Dissenting Opinion,

CHRISTLEY, J., concurs with the second, fourth, fifth, sixth, seventh, eighth, and ninth assignments of error; concurs in judgment only as to the first and third assignments of error with Concurring Opinion.

COURT OF APPEALS, ELEVENTH DISTRICT, LAKE COUNTY, OHIO IN RE: THE ADOPTION OF EMILY ANNA WAGNER CASE NO. 97-T-0223, Filed July 1, 1999

CONCURRING/DISSENTING OPINION

FILED COURT OF APPEALS JUL 01 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

FORD, P.J.:

I respectfully concur with most of the majority's treatment of this matter.

This writer concurs in judgment only with the majority on the seventh assignment of error. The majority discusses the constitutionality of applying R.C. 3107.07(A) to the consent phase of the adoption. R.C. 3107.07(A) states that consent to an adoption is no required of a natural parent when it is alleged that the parent has failed without justifiable cause to communicate with or provide maintenance and support for the minor for a period of at least one year immediately preceding the filing of the adoption petition. Th writer notes that the requirements of the statute concerning the issue of the amount of support needed from a parent's total oblig

tion to determine whether his or her consent is required to allow an adoption matter to proceed is case specific and is a legislative problem that the Supreme Court of Ohio has not yet solved.

However, a potential adoptive parent has the burden of proving, by clear and convincing evidence that the natural parent failed to support his or her child during the one-year period preceding the adoption petition, and that there was no justifiable cause for failing to provide for the support of the child. In re Adoption of Hale (July 22, 1988), Lake App. No. 12-238, unreported, at 6. See, also, In re Adoption of Cline (1993), 89 Ohio App.3d 450, 456; Quinn v. Helman (Sept. 13, 1985), Trumbull App. No. 3509, unreported, at 3. It is evident from this district's cases on this subject that an insubstantial amount of support alone will not necessarily provide a trial court with the basis to negate consent by a natural parent when the plaintiff has failed to meet the burden of establishing the negative concept of no justifiable cause by clear and convincing evidence. Members of this court still hold to that rule in these proceedings. It is this writer's position that the statute must be strictly construed to protect the rights of the natural parents, and, therefore, trial courts in our district should be alert to this common thread in our opinion on this issue.

While not expressly addressing the arguments by the parties in the seventh assignment of error again, it is this writer's position that the majority erred in concluding that the doctrine of res judicata applies. I am of the opinion that the majority has misstated the doctrine of the "law of the case," as stated in Nolan v. Nolan (1984), 11 Ohio St.3d 1. According to Nolan, the doctrine of the "law of the case" provides that a reviewing court's decision "in a case remains that law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." Id. at 3. Thus, this rule ensures the consistency of results in a case. Accordingly, pursuant to Nolan, I conclude that in disposing of this issue, we are solely bound by the doctrine of the law of the case, and not res judicata.

However, I dissent from the majority for its failure to discuss issues presented in the third and fourth assignments of error. In the

third assignment of error, appellant raised the issue of the constitutionality of the granting of the adoption without notice of a filing, and without admitting reports into evidence at the "best interest" hearing. In his fourth assignment of error, appellant mentioned the constitutionality of his exclusion from the state- initiated investigation. These issues were presented to us, but were not addressed in the majority opinion. I, therefore, again dissent from the majority because of its failure to address these issues.

Hence, I concur with the majority regarding its analysis and conclusions as to the first, second, fifth, sixth, eighth and ninth assignments of error; I concur in judgment only as to the seventh assignment of error; and I dissent with respect to the third and fourth assignments of error.

/s/ PRESIDING JUDGE DONALD R.FORD

COURT OF APPEALS, ELEVENTH DISTRICT, LAKE COUNTY, OHIO IN RE: THE ADOPTION OF EMILY ANNA WAGNER CASE NO. 97-T-0223, Filed July 1, 1999

CONCURRING OPINION

FILED COURT OF APPEALS JUL 01 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

CHRISTLEY, J.

I respectfully concur in judgment only as to the first and third assignments of error. I agree with the conclusion of the majority regarding the first assignment of error as it relates to the time frame of admissible relevant evidence with respect to the "best interest" element.

My concern is that the legislative intent of this bifurcated process of consent and best interest appears to be contradictory. Specifically, I have difficulty with the concept that, under the statute as written, a biological parent whose consent has been determined to be unnecessary can, nevertheless, challenge the adoption proceed-

ing in the best interest phase. Not only is it apparent that the disenfranchised parent can challenge the suitability of the proposed adoptive parent, but the parent can again litigate his or her own role in the child's life by challenging the ability of the child to be adopted by anyone.

I find this to be both confusing and contradictory. Nevertheless, under R.C. 3107.161 and its companion statutes, it appears the nonconsenting parent can, again, in the best interest phase, litigate his or her own right to continue as a parent to the child.

If the legislature truly intended that the consent of a parent was not necessary, it would make more sense if the evidence in the "best interest" hearing did not address whether the nonconsenting parent was improperly denied either his or her right to consent or his or her right to continue as a parent. Certainly appellant should be entitled to a voice regarding "best interest," but that voice should only be able to challenge the suitability of the petitioner as the proposed adoptive parent, not the issue of adoption per se.

If that had been the law, then appellant's attempts to submit evidence would have been rebuffed as being irrelevant on that basis. Specifically, the issues regarding Ms. Wagner's alleged denial of visitation rights to him; the suitability of appellant's own home when the children were permitted to come and visit with him; and, the parental alienation syndrome would no longer be issues available to be litigated. [FN1]

FN1. I, nevertheless, believe that the "denial of visitation" and "alienation syndrome" are irrelevant to any adoption issue, even under the current statute.

Unfortunately the law as now written seems to permit a second opportunity to litigate the rights of a non-consenting parent and to provide a forum for that parent to demonstrate that his shortcomings as a parent were not his fault.

In conclusion, I agree with the majority that the one year restriction on the evidence related to the best interest hearing was too

limiting, and I reluctantly agree that evidence as to appellant's right to block any adoption process is admissible.

As to the third assignment regarding the need for inclusion of the appellant in the psychological evaluations, I agree that such evaluations were mandatory under the applicable former statute. However, that issue is waived as the appellant did not object at the trial court level. He did cross-examine the social worker vigorously as to his exclusion from the report, but he never objected to its admission on that basis. Neither did he request a continuance so that he could be included in such a report. Instead, he raises this issue for the first time on appeal. Further, I find it significant that the mandatory nature of this part of the statute has since been eliminated by the legislature.

I, therefore, would find no error on the part of the trial court in this regard.

Thus, I concur in judgment only as to the first and third assignments of error. In all other respects, I concur in the judgment and analysis of the majority.

/s/ JUDGE JUDITH A. CHRISTLEY

STATE OF OHIO }
} SS.
COUNTY OF TRUMBULL }

IN THE COURT OF APPEALS, ELEVENTH DISTRICT Filed July 1, 1999

JUDGMENT ENTRY

CASE NO. 97-T-0223

FILED COURT OF APPEALS JUL 01 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

For the reasons states in the Opinion of this court,it is judgment

and order of this court that the judgment of the trial court is reversed and this matter is remanded for further proceedings consistent with this Opinion. All pending motions currently before this court are hereby overruled as moot. It is the further orderof this court that the parties equally share the costs of this proceeding.

/s/ JUDGE WILLIAM M. O'NEILL, FOR THE COURT

FORD, P.J., concurs with the first, second, fifth, sixth, eighth, and ninth assignments of error; concurs in judgment only as to the seventh assignment of error; dissents on the third and fourth assignments of error with Concurring/Dissenting Opinion,

CHRISTLEY, J., concurs with the second, fourth, fifth, sixth, seventh, eighth, and ninth assignments of error; concurs in judgment only as to the first and third assignments of error with Concurring Opinion.

(Cite as: 1999 WL 689971 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In re the Adoption of Benjamin Matthew WAGNER. No. 97-T-0224.

Court of Appeals of Ohio, Eleventh District, Trumbull County. Filed July 1, 1999.

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 94 ADP 058.

Roger D. Juntunen, Hubbard, OH, for Respondent-Appellant. Elise M. Burkey, Warren, OH, for Petitioner-Appellee, Mark V. Wagner.

JUDGMENT: Reversed and remanded.

FORD, CHRISTLEY and O'NEILL, JJ.

OPINION

FILED COURT OF APPEALS JUL 01 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

O'NEILL., J.

The following is an appeal from an ongoing process involving the adoption of a child, Benjamin (d.o.b.3/21/87), by her stepfather, appellee, Mark V. Wagner ("appellee"). In the current appeal, appellant, Roger Juntunen ("appellant"), Benjamin's natural father, alleges error in the trial court's determination that the best interest of the child would be served by permitting the adoption and permanently terminating his parental rights. Based on errors below that prevented appellant from fully participating at the hearing held to determine the best interest of the child, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

The facts pertinent to this appeal are as follows. On June 23, 1994, appellee filed a petition in the Probate Division of the Trumbull County Court of Common Pleas seeking to adopt his two stepchildren, Benjamin and Emily (d.o.b. 9/8/89). By way of background, appellee's wife, Deborah Wagner (f.k.a. Juntunen), was previously married to appellant and two children, Benjamin and Emily, were born as issue to this marriage. On July 15, 1991, the children's natural parents were granted a decree of dissolution in the state of Indiana. Ms. Wagner was designated the residential parent and appellant, with an income potential exceeding $35,000 per year, was ordered to pay $150 per week in child support. On December 31, 1991, Ms. Wagner married appellee, and since that date, the children have resided with appellee and their mother.

In his petition, appellee alleged that appellant's consent to the adoption was unnecessary because, pursuant to R.C. 3107.07, appellant failed without justifiable cause to communicate and/or

provide support for his children for the one-year period immediately preceding the filing of his petition. At a hearing held on the issue of whether appellant's consent was needed for the adoption to proceed, evidence was presented that appellant rarely visited his children and failed to satisfy his court ordered support payments. For the one- year period immediately preceding the filing of appellee's adoption petition, June 23, 1993 to June 23, 1994, appellant saw his children four times for a total of approximately three hours. During the same twelve-month period, appellant paid a total of $329.40 in child support.

By judgment entry filed March 22, 1995, the trial court determined that appellant's consent to the adoption was not necessary. The trial court based its decision on appellant's failure, without justifiable cause, to support his children above the mere $329.40 that was paid. The trial court's judgment entry did not address appellee's contention that appellant failed to communicate with the children and this was not a factor in the trial court's determination at this phase of the adoption proceedings. This court affirmed the trial court's decision in In re Adoption of Wagner (1997), 117 Ohio App.3d 448, 690 N.E.2d 959, and a discretionary appeal to the Supreme Court of Ohio was not allowed in (1997), 78 Ohio St.3d 1516, 679 N.E.2d 311.

Following the proceedings which determined that the adoption process could occur without appellant's consent, the trial court scheduled a hearing to determine the best interest of the child. Prior to this hearing, and pursuant to R.C. 3107.12, a caseworker from the Trumbull County Children Services Board, Annette Weimer, submitted to the court confidential reports containing her assessment of appellee and the children. The reports contained no assessment of the relationship between Benjamin and her natural father, appellant.

On September 30, 1997, the trial court conducted a hearing on appellee's adoption petition to determine the best interest of the children. Annette Weimer testified as to her findings contained within the confidential reports she previously filed with the trial court. She described appellee as an easygoing, hardworking person

who provided adequate income for his family's financial needs. She found the Wagner home to be adequately furnished with excellent housekeeping standards. Personal references submitted to the Board were all positive toward appellee and he was described as a loving father who exhibited genuine concern and affection for the children.

As for the children, Ms. Weimer described them as "anxious" to be adopted by appellee and, in fact, were already using the Wagner name in church and school. The children were described as developing normally and were involved in activities typical for their age at both church and school. Ms. Weimer testified that the children share a close relationship with appellee, who they refer to as "Dad." By contrast, Ms. Weimer testified that the children do not share a close relationship with appellant and that their memories of him are not positive. Ms. Weimer opined that the adoption of Benjamin and Emily by appellee was in the best interest of the child.

On cross-examination, Ms. Weimer acknowledged that she did not question appellant, despite his availability, before submitting her assessments to the court regarding appellee's requested adoptions. She further acknowledged that she was not aware, and did not factor into her best interest determination, instances where Ms. Wagner was found in contempt for interfering with appellant's visitation rights in the past.

Appellant also attempted to question Ms. Weimer regarding the children's poor opinion of him, and, specifically, the possibility that they suffered from "Parental Alienation Syndrome" as a result of brainwashing brought about by appellee and/or Ms. Wagner. Ms. Weimer testified that she was not familiar with this particular theory, however, she stated that she interviewed the children alone and did not believe they had been coached as to what to say during their interview with her.

Both appellee and Ms. Wagner testified as to appellee's willingness to raise the children and the lack of involvement that appellant has had in his children's development. Ms. Wagner described

how, in many respects, appellee is the only father that the children have known. She testified that the children were eager to have the adoption become official and described a circumstance when one of the children, who was selected to receive an award at school, became upset about being announced to the class as a "Juntunen" and not a "Wagner."

Ms. Wagner denied that she told the children what to say about their natural father when they were interviewed by Ms. Weimer. She further denied that she prohibited appellant from interacting with the children. However, on cross-examination appellant challenged Ms. Wagner's credibility as to this point by questioning her with a prior judgment issued from the Domestic Relations Division of the Trumbull County Court of Common Pleas, which held that she "willfully denied [appellant] his visitation" on at least two occasions in the spring of 1995.

Ms. Wagner further testified that both students receive straight "A's" on their report cards and participate in numerous activities at church and school. Appellee's father, Clyde R. Wagner, testified as to his willingness to accept Benjamin and Emily as his grandchildren and described many of the activities that the children participate in during their visits with him.

In response to the evidence presented by appellee as to the best interest of the children, appellant argued that he has tried to be a part of his children's lives as much as possible. However, he accused Ms. Wagner of engaging in a pattern of activity to inhibit him from fostering a relationship with his children.

Appellant testified that he resides less than ten minutes away from his children where he lives with his current spouse, Jane Spies, and their daughter, Sarah (d.o.b. 12/3/95). Despite his family's close proximity to Benjamin and Emily, appellant asserts that Ms. Wagner has thwarted his attempts to visit with his children. Appellant attempted to present, with varying degrees of success, evidence of specific instances where Ms. Wagner prevented him from seeing his children. Ms. Spies confirmed that her husband attempted to enforce his visitation rights every weekend, but was

usually prevented from exercising those rights based on the actions of Ms. Wagner.

Ms. Spies also testified that she received a bachelor's degree in psychology and a master's in guidance and counseling. She further stated that she has taken Ph.D. level course work in counseling and psychology and expressed some familiarity with "Parental Alienation Syndrome." Based on her observations of the times appellant was permitted to exercise his visitation rights, Ms. Spies stated that the children acted lovingly toward their natural father as well as their new baby sister. She saw no indication that the children wanted to end their relationship with appellant. To the extent that the children may have reported that they now want no contact with their father, Ms. Spies opined that the children had been programmed or "brainwashed" into saying these things by Ms. Wagner and/or appellee.

At the hearing, appellant admitted that he was behind in his child support payments and did not deny Ms. Wagner's estimate that he was in arrears more than $40,000. He also did not deny that appellee was adequately providing for the needs of the children. However, appellant claimed that he now holds a steady job that would permit him to pay his child support obligation. He also expressed a desire to do anything for his children and attempted to elicit evidence as to his ability to care for the children during time periods when he exercised his visitation rights. Both he and Ms. Spies believed that the children would face irreparable harm if the court permanently terminated appellant's parental rights and failed to foster the children's relationship with both sets of parents.

On November 5, 1997, the trial court issued its decision highlighting the testimony as presented by appellee in this matter and concluded that the adoption of Benjamin by her stepfather was in her best interest. From this judgment, appellant filed a timely notice of appeal and now asserts the following nine assignments of error:

"[1.] The granting of the adoption is contrary to law, against the manifest weight of the evidence, and an abuse of judicial discre-

tion where the trial court restricts appellant's relevant 'best interest' testimony and evidence to the one year prior to the filing of the adoption petition, in violation of Ohio Revised Code 3107.161(B), where Ohio Revised Code 3107.07(A) does not apply.

"[2.] The granting of the adoption is unconstitutional and violates the separation of church and state and the equal protection clause of the United States Constitution where the judgment entry is based on testimony that: 'both children ... already use the last name Wagner in church', 'Mr. Wagner is active ... in church activities with them', 'the family attends church together regularly', 'the children have had perfect attendance in Sunday school for the last three years', and 'the extended family extends church and gathers together every Sunday for dinner.'

"[3.] The granting of the adoption without 'notice of filing' and 'proof of service' of the state-initiated 'Report on Proposed Adoption; or the "ODHS Prefinalization Report' and without admission of said reports into evidence at the 'best interest' hearing subject to cross-examination by the appellant, is unconstitutional and violates the appellant's civil liberties as a parent and due process rights under the Fourteenth Amendment.

"[4.] The exclusion of appellant from the state-initiated investigation and subsequent 'Report on Proposed Adoption' and 'ODHS Prefinalization Report' is unconstitutional and violates the appellant's liberty interest in the maintenance of the parent-child relationship and due process rights under the Fourteenth Amendment.

"[5.] The de facto termination of the appellant's parent-child relationship via the granting of an adoption under the 'best interest' standard without the consent of the appellant and without a prior legal termination of the appellant's parental rights is unconstitutional and a violation of the appellant's civil liberties as a parent and due process rights under the Fourteenth Amendment of the United States Constitution.

"[6.] The granting of an adoption based on the prior fraudulent and

illegal use of the 'Wagner' last name is fraudulent, contrary to law, unconscionable, and abuse of judicial discretion.

"[7.] Ohio Revised Code 3107.07(A) is unconstitutional because it is too vague and forces judges to use personal subjective values resulting in arbitrary legislation of the judiciary which violates the appellant's due process and equal protection rights under the Fourteenth Amendment.

"[8.] The granting of the adoption is fraudulent, contrary to law, and against the manifest weight of the evidence where the natural mother committed the crime of perjury under oath at the 'best interest' hearing and said perjury is material to the 'best interest' determination regarding contempt findings against her for failure to provide lawful visitation and regarding her compliance with a court ordered psychological evaluation to determine 'best interest' of the child and attend family counseling with Dr. Douglas Darnall, Ph.D.

"[9.] The granting of the adoption is against the manifest weight of the evidence and contrary to law where the judgment entry does not independently consider all relevant factors related to the 'best interest' of the child in a contested adoption required by Ohio Revised Code 3107.161(B)."

For ease of disposition of this appeal, we will address the above assignments of error in an order different from that presented by appellant. Generally speaking, we will attempt to address appellant's assignments of error in the following order: arguments appellant raises regarding the necessity of his consent to the adoption; alleged errors in the trial court's reliance on evidence submitted by appellee in support of his petition for adoption; and alleged restrictions placed on appellant's attempt to present evidence concerning the best interest of the child determination.

In the fifth assignment of error, appellant claims that the trial court erred in terminating his parental relationship with his children based solely on the best interest determination without a "judicial finding of mental unfitness, neglect, abuse, or other legal reason to

terminate [his] rights." However, appellant's argument is a mischaracterization of the history surrounding appellee's adoption petition.

An adoption proceeding involves a two-step process consisting of a "consent" phase and a "best interest" phase. See, e.g., In re Adoption of Jordan (1991), 72 Ohio App.3d 638, 645, 595 N.E.2d 963; In re Janoske (Nov. 22, 1991), Geauga App. No. 90-G-1589, unreported, at 3. Previously, the trial court determined by clear and convincing evidence that appellant, without justifiable cause, failed to adequately support his children for the one-year period immediately preceding the filing of appellee's adoption petition. This determination, equating to a finding of legal abandonment of the children by appellee, was upheld on appeal. Following the appellate process, the trial court turned to the second phase of the adoption process, the "best interest" phase.

As a result of the trial court's adherence to the two-step adoption process, the constitutional arguments appellant raises as to the termination of his parental rights "via a best interest hearing only" are patently false. Appellant's fifth assignment of error is devoid of merit.

Turning to appellant's seventh assignment of error, appellant attempts to argue that the consent phase of the adoption process, conducted pursuant to R.C. 3107.07(A), is unconstitutional. Specifically, appellant argues that R.C. 3107.07(A) fails to set forth a statewide minimum that a natural parent must pay toward their child support obligation in order to preserve their parental rights.

As discussed in appellant's fifth assignment of error, the consent phase of the adoption process in this matter has been concluded, and appellant's arguments as to the unfairness of the trial court's determination as to that issue has survived the appellate process. We will not discuss those arguments again in the current appeal. Pursuant to the doctrines of res judicata and/or the "law of the case," appellant is prohibited from raising errors in a subsequent action that should have been raised or were already decided in the

prior action. See, e.g., National Amusements, Inc. v. Springdale (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178; Nolan v. Nolan (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410. Appellant's seventh assignment of error is without merit.

In the next set of arguments, appellant raises several assignments of error with respect to the trial court's reliance on evidence presented by appellee in support of his petition for adoption. In the second assignment of error, appellant asserts that the "theme" of the trial court's decision to grant the adoption petition centered upon appellee's participation in church related activities with the children. Appellant argues that the court's repeated reference to these activities in its judgment entry amounts to a violation of his First Amendment Rights and the separation between church and state.

Appellant also alleges that the trial court's "best interest" determination is contrary to law because the decision relied on fraudulent evidence attributed to Ms. Wagner as part of her continued attempt to alienate the children from him. Specifically, appellant claims in the sixth assignment of error that appellee has illegally used the name "Wagner" as the children's surname, and, in the eighth assignment of error, argues that he established that Ms. Wagner lied at the hearing regarding her repeated interference with his visitation rights.

Adoption matters are decided on a case-by-case basis through the exercise of the discretion granted a trial court to determine matters such as the best interest of the child. In re Adoption of Charles B (1990), 50 Ohio St.3d 88, 90, 552 N.E.2d 884. Moreover, it is primarily the responsibility of the trial court to weigh the testimony presented before it and determine the credibility of the witnesses. See, e.g., Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 23, 550 N.E.2d 178.

In reviewing the trial court's judgment entry, however, it is evident that the only "theme" underlying the court's decision is the uncontroverted fact that appellee has shouldered, for whatever reason, the responsibility of caring for appellant's children since 1991. As

the court noted in its entry, it is appellee that the children refer to as their father, it is appellee that participated in their important events, such as church and school related activities, and it is appellee who has provided for the children's financial and emotional needs.

The fact that the trial court mentioned the word "church" in its judgment entry to help describe some of the activities appellee engaged in with the children does not amount to a violation of appellant's First Amendment Rights. The trial court's reference to church activities is not an endorsement of religious activity. Rather, it is used as an example of a type of activity which apparently is important to the children and the Wagners. The trial court judgment did not rely, as argued by appellant, on any "illegal" or "unconstitutional" basis. Moreover, this court refuses to interfere with the lower court's determinations regarding the credibility of the witnesses and its resolutions of factual disputes as argued in these assignments of error. Appellant's second, sixth, and eighth assignments of error are without merit.

We recognize that appellant is understandably upset at the fact that appellee has become the children's central father figure. We further recognize the pain appellant must feel to hear the characterization that his children want nothing to do with him and fear ridicule from their classmates when referred to as a "Juntunen" and not a "Wagner." However, appellee's willingness to care for appellant's children, both financially and emotionally, as well as the children's acceptance of their stepfather are facts that appellant did not dispute at trial. Based on the evidence submitted to the court, at this point, a very strong case has been made for why the best interest of the child would be served by the court's granting of appellee's adoption petition.

Appellant did not attack appellee's adoption petition by questioning appellee's ability to care for his children. Instead, appellant focused his arguments on why he has not played a part in his children's lives and the reasons for his children's poor opinion of him. Appellant alleged that he has always expressed a willingness to play a role in the children's development, but has been denied

that chance based on his former wife's continued attempts to alienate the children from him. While appellee no doubt disputes appellant's claimed willingness to be a consistent means of support to the children, both financially and emotionally, we do share some of appellant's concerns, as expressed in his remaining assignments of error, regarding his ability to have his arguments heard by the trial court.

In the third and fourth assignments of error, appellant alleges error with respect to assessments filed by Ms. Weimer to the trial court concerning appellee's petition for adoption. Appellant asserts that he was never notified that the assessments of appellee and the children were being performed and was never given an opportunity to participate in the investigations. He further asserts that he was never given a copy of the reports filed in the court and had no way to question the information provided by Ms. Weimer.

R.C. 3107.031 states, in pertinent part that:

"An assessor shall conduct a home study for the purpose of ascertaining whether a person seeking to adopt a minor is suitable to adopt. A written report of the home study shall be filed with the court at least ten days before the petition for adoption is heard.

"The report shall contain the opinion of the assessor as to whether the person who is the subject of the report is suitable to adopt a minor and other information and documents specified in rules adopted by the department of human services * * *.

"On request, the assessor shall provide the person seeking to adopt a copy of the report of the home study. The assessor shall delete from that copy any provisions concerning the opinion of other persons, excluding the assessor, of the person's suitability to adopt a minor."

In addition to the home study report, R.C. 3107.12 required that an assessment also be made of the petitioner and the child. [FN1] R.C. 3107.12 provided, in pertinent part, as follows:

FN1. Since the trial court's hearing on the best interest of the child, R.C. 3107.12 has been revised, effective August 5, 1998, no longer requiring a prefinalization assessment to be conducted if the petitioner is the child's stepparent. Under the new statute, the trial court may order that an assessor conduct a prefinalization assessment if the report is deemed in the child's best interests. See revised R.C. 3107.12(B).

"An assessor shall conduct a prefinalization assessment of a minor and petitioner before a court issues a final decree of adoption or finalizes an interlocutory order of adoption for the minor. On completion of the assessment, the assessor shall prepare a written report of the assessment and provide a copy of the report to the court before which the adoption petition is pending.

"The report of a prefinalization assessment shall include all of the following:

"(A) The adjustment of the minor and the petitioner to the adoptive placement;

"(B) The present and anticipated needs of the minor and the petitioner, * * *;

"(C) The physical, mental, and developmental condition of the minor;

"(D) If known, the minor's biological family background, including identifying information about the biological or other legal parents;

"(E) The reasons for the minor's placement with the petitioner, the petitioner's attitude toward the proposed adoption, and the circumstances under which the minor was placed in the home of the petitioner;

"(F) The attitude of the minor toward the proposed adoption, if the minor's age makes this feasible;

"* * * *"

While R.C. 3107.031 and former R.C. 3107.12 mandate that assessments be made of the petitioner, the petitioner's home, and the child, there are no requirements as to how these investigations should be conducted. As the Fourth District Court of Appeals stated in In re Adoption of Howell (1991), 77 Ohio App.3d 80, 93, 601 N.E.2d 92:

"The statute does not differentiate the type of investigation that should be conducted for different types of adoptions. Logically, if parents have surrendered a child for adoption and both parents have sought to have their child adopted, there may not be a need to contact the natural parents of the child. However, in a contested adoption proceeding, it is difficult to see how the child's best interest may properly be determined if the investigator has only inquired as to the condition of the petitioners and the child."

In the case sub judice, we agree with appellant's assertion that he was not permitted to participate in the creation of Ms. Weimer's reports to the trial court. R.C. 3107.12(B) provided that the assessor shall, if known, include information in the assessment regarding the child's biological family background. Despite appellant's availability to participate in the assessment, Ms. Weimer wrote "N/A" when she came to this section of her report regarding the biological family.

We are deeply concerned at the way the prefinalization report was prepared in this matter. Aside from the mandatory language utilized by the legislature, the information provided under former R.C. 3107.12(D) can be vital, particularly in a circumstance where an adoptive child may begin experiencing unexplained physiological or psychological problems. See factual situation in Burr v. Stark Cty. Bd. of Commrs. (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101. Relevant to this matter, Ms. Weimer's failure to contact appellant also gives the impression that his thoughts as to the adoption do not matter and ends up providing the court with a rather one-sided account as to why appellee's petition for adoption should be granted.

As to appellant's ability to receive a copy of Ms. Weimer's reports, we would note that he failed to afford himself of the protections provided in R.C. 3107.17(B) that permit the disclosure of the information he seeks upon the consent of the court. See In re Adoption of Dervenis (Dec. 28, 1995), Franklin App. No. 95APF07-869, unreported. We further note that Ms. Weimer was called to testify at the best interest hearing where she conveyed the results of her assessments and faced cross-examination from appellant regarding any shortcomings in the process she utilized in compiling her assessments for the court. As indicated by appellant, this cross-examination revealed that Ms. Weimer never contacted appellant as she was compiling her evaluations, and, thus, her recommendations concerning the best interest of the children did not consider appellant's views on the adoption.

Despite the shortcomings in Ms. Weimer's report, we cannot agree with appellant's assertion that he was prejudiced by the report, particularly in a circumstance, such as this one, where the assessor was subject to cross-examination, and, as will be discussed in the next assignment of error, appellant has or will be given an opportunity to present evidence to counter the findings submitted in the assessor's report. See Howell, 77 Ohio App.3d at 91, 601 N.E.2d 92; In re Adoption of Aiken (Mar. 30, 1992), Montgomery App. No. 12522, unreported. Appellant's third and fourth assignments of error are without merit.

This leads us to appellant's first assignment of error, and the allegations that the trial court improperly limited the evidence he wished to present in opposition to appellee's petition for adoption. Specifically, appellant cites to a number of instances in the record where the trial court limited his presentation of evidence to the one-year period immediately preceding the filing of appellee's adoption petition.

In dealing with a pro se litigant, it is evident that the trial court attempted to grant appellant as much latitude as possible in his presentation of his case. However, a review of the record confirms appellant's claims that the trial court limited his presentation to

those facts that occurred within the one-year-time period immediately preceding the filing of appellee's petition. The restrictions to appellant's presentation typically occurred when appellant sought to question Ms. Wagner regarding her willingness to grant him visitation rights as well as evidence concerning the suitability of his home when the children are permitted to come and visit with him. Specifically, the trial court's comments included the following:

"Q: (By Mr. Juntunen to Ms. Wagner) In 1995, for instance on September 29th, 1995, did you allow me my lawful visitation with Benjamin and Emily?

"(By appellee's counsel): I'm going to note a continuing objection as to the relevancy.

"BY THE COURT: I'm going to sustain the objection. The issue here, as I've indicated, is the best interest of the children. The time frame that we're concerned about is the year immediately preceding the filing of the petition for—or in close proximity to that time frame. The petition, as I have indicated, was filed on June 23, 1994. So, we're concerned with the period of time from June of '93 to June of '94. If there are any relevant factors around that time period, the Court may consider that as well."

While R.C. 3107.07(A) limited the "consent" phase of this adoption proceeding to the time period consisting of the year immediately preceding the filing of appellee's adoption petition, there is no such restriction in the determination of the best interest of the child. The very fact that the trial court had to consider a prefinalization report prior to issuing a final decree of adoption establishes that the court must consider evidence outside of the one-year time period referenced in R.C. 3107.07(A). In determining the best interest of the child, R.C. 3107.161 provides:

"(A) As used in this section, 'the least detrimental available alternative' means the alternative that would have the least long-term negative impact on the child.

"(B) When a court makes a determination in a contested adoption concerning the best interest of a child, the court shall consider all relevant factors including, but not limited to, all of the following:

"(1) The least detrimental available alternative for safeguarding the child's growth and development;

"(2) The age and health of the child at the time the best interest determination is made and, if applicable, at the time the child was removed from the home;

"(3) The wishes of the child in any case in which the child's age and maturity makes this feasible;

"(4) The duration of the separation of the child from a parent;

"(5) Whether the child will be able to enter into a more stable and permanent family relationship, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements;

"(6) The likelihood of safe reunification with a parent within a reasonable period of time;

"(7) The importance of providing permanency, stability, and continuity of relationships for the child;

"(8) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

"(9) The child's adjustment to the child's current home, school, and community;

"(10) The mental and physical health of all persons involved in the situation;

"(11) Whether any person involved in the situation has been convicted of, pleaded guilty to, or accused of any [relevant]

criminal offense * * *.

"(C) A person who contests an adoption has the burden of providing the court material evidence needed to determine what is in the best interest of the child and must establish that the child's current placement is not the least detrimental available alternative." (Emphasis added.)

Unlike R.C. 3107.07(A), R.C. 3107.161 does not contain a one-year restriction from which to consider evidence. Thus, it was improper for the trial court to restrict appellant's evidence at the "best interest" phase to this time period. Appellant's first assignment of error has merit.

Throughout these proceedings, appellant has expressed his desire to do everything in his power to prevent the permanent termination of his parental rights. He has done this for the stated purpose of letting his children know that he did not permit the adoptions to occur without a fight. While appellant's statements are admirable, they are clearly in conflict with his continued practice of failing to provide financial and emotional support for his children. However, appellant submits that he can prove that any shortcomings he has had as a father are not his fault and that the children's best interest would be served by the court fostering a relationship between the children and both sets of families. The law requires the court to come up with the "least detrimental alternative."

Based on the restrictions that were placed on appellant's presentation of his case, on remand appellant shall have an opportunity to present to the trial court any additional evidence relevant to the best interest determination. This determination may include appellant's development of his theory that the children suffer from "Parental Alienation Syndrome" as a result of Ms. Wagner's past actions. We will warn appellant, however, that he is treading on very thin ice and we strongly recommend that he retain counsel. If he has actual evidence that the children suffer from "Parental Alienation Syndrome" and could develop a meaningful relationship with the Juntunen family, appellant needs to now present that evidence to the trial court in a way that conforms to the Ohio Rules

of Evidence and Procedure. On remand, appellee should also be given an opportunity to respond to any evidence submitted by appellant if he so desires.

We remind appellant that the trial court's determination will be made on the evidence that was admitted at the prior hearing and the relevant evidence that will properly be admitted as a result of our remand. The subjective desires of appellant will not suffice to meet his burden to present evidence that the adoption of the children by their stepfather is not the least detrimental alternative available.

As a result of our determination regarding appellant's first assignment of error, appellant's arguments concerning the trial court's consideration of all relevant factors in its judgment entry are moot. Based on the foregoing, the judgment of the trial court is reversed and this matter is remanded for further proceedings consistent with this opinion. All pending motions currently before this court are hereby overruled as moot. It is the further order of this court that the parties equally share the costs of this proceeding.

/s/ JUDGE WILLIAM M. O'NEILL

FORD, P.J., concurs with the first, second, fifth, sixth, eighth, and ninth assignments of error; concurs in judgment only as to the seventh assignment of error; dissents on the third and fourth assignments of error with Concurring/Dissenting Opinion,

CHRISTLEY, J., concurs with the second, fourth, fifth, sixth, seventh, eighth, and ninth assignments of error; concurs in judgment only as to the first and third assignments of error with Concurring Opinion.

COURT OF APPEALS, ELEVENTH DISTRICT, LAKE COUNTY, OHIO IN RE: THE ADOPTION OF BENJAMIN MATTHEW WAGNER CASE NO. 97-T-0224 Filed July 1, 1999

CONCURRING/DISSENTING OPINION

FILED COURT OF APPEALS JUL 01 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

FORD, PJ.

I respectfully concur with most of the majority's treatment of this matter.

This writer concurs in judgment only with the majority on the seventh assignment of error. The majority discusses the constitutionality of applying R.C. 3107.07(A) to the consent phase of the adoption. R.C. 3107.07(A) states that consent to an adoption is not required of a natural parent when it is alleged that the parent has failed without justifiable cause to communicate with or provide maintenance and support for the minor for a period of at least one year immediately preceding the filing of the adoption petition. This writer notes that the requirements of the statute concerning the issue of the amount of support needed from a parent's total obligation to determine whether his or her consent is required to allow an adoption matter to proceed is case specific and is a legislative problem that the Supreme Court of Ohio has not yet solved.

However, a potential adoptive parent has the burden of proving, by clear and convincing evidence that the natural parent failed to support his or her child during the one-year period preceding the adoption petition, and that there was no justifiable cause for failing to provide for the support of the child. In re Adoption of Hale (July 22, 1988), Lake App. No. 12-238, unreported, at 6. See, also, In re Adoption of Cline (1993), 89 Ohio App.3d 450, 456; Quinn v. Helman (Sept. 13, 1985), Trumbull App. No. 3509, unreported, at 3. It is evident from this district's cases on this subject that an insubstantial amount of support alone will not necessarily provide a trial court with the basis to negate consent by a natural parent when the plaintiff has failed to meet the burden of establishing the negative concept of no justifiable cause by clear and convincing evidence. Members of this court still hold to that rule in these proceedings. It is this writer's position that the statute must be strictly construed to protect the rights of the natural parents, and, therefore, trial courts in our district should be alert to this common

thread in our opinion on this issue.

While not expressly addressing the arguments by the parties in the seventh assignment of error again, it is this writer's position that the majority erred in concluding that the doctrine of res judicata applies. I am of the opinion that the majority has misstated the doctrine of the "law of the case," as stated in Nolan v.Nolan (1984), 11 Ohio St.3d 1. According to Nolan, the doctrine of the "law of the case" provides that a reviewing court's decision "in a case remains that law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." Id. at 3. Thus, this rule ensures the consistency of results in a case. Accordingly, pursuant to Nolan, I conclude that in disposing of this issue, we are solely bound by the doctrine of the law of the case, and not res judicata.

However, I dissent from the majority for its failure to discuss issues presented in the third and fourth assignments of error. In the third assignment of error, appellant raised the issue of the constitutionality of the granting of the adoption without notice of a filing, and without admitting reports into evidence at the "best interest" hearing. In his fourth assignment of error, appellant mentioned the constitutionality of his exclusion from the state- initiated investigation. These issues were presented to us, but were not addressed in the majority opinion. I, therefore, again dissent from the majority because of its failure to address these issues.

Hence, I concur with the majority regarding its analysis and conclusions as to the first, second, fifth, sixth, eighth and ninth assignments of error; I concur in judgment only as to the seventh assignment of error; and I dissent with respect to the third and fourth assignments of error.

/s/ PRESIDING JUDGE DONALD R. FORD

COURT OF APPEALS, ELEVENTH DISTRICT, LAKE COUNTY, OHIO IN RE: THE ADOPTION OF BENJAMIN MATTHEW WAGNER CASE NO. 97-T-0224 Filed July 1, 1999

CONCURRING OPINION

FILED COURT OF APPEALS JUL 01 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

CHRISTLEY, J.

I respectfully concur in judgment only as to the first and third assignments of error. I agree with the conclusion of the majority regarding the first assignment of error as it relates to the time frame of admissible relevant evidence with respect to the "best interest" element.

My concern is that the legislative intent of this bifurcated process of consent and best interest appears to be contradictory. Specifically, I have difficulty with the concept that, under the statute as written, a biological parent whose consent has been determined to be unnecessary can, nevertheless, challenge the adoption proceeding in the best interest phase. Not only is it apparent that the disenfranchised parent can challenge the suitability of the proposed adoptive parent, but the parent can again litigate his or her own role in the child's life by challenging the ability of the child to be adopted by anyone.

I find this to be both confusing and contradictory. Nevertheless, under R.C. 3107.161 and its companion statutes, it appears the nonconsenting parent can, again, in the best interest phase, litigate his or her own right to continue as a parent to the child.

If the legislature truly intended that the consent of a parent was not necessary, it would make more sense if the evidence in the "best interest" hearing did not address whether the nonconsenting parent was improperly denied either his or her right to consent or his or her right to continue as a parent. Certainly appellant should be entitled to a voice regarding "best interest," but that voice should only be able to challenge the suitability of the petitioner as the proposed adoptive parent, not the issue of adoption per se.

If that had been the law, then appellant's attempts to submit

evidence would have been rebuffed as being irrelevant on that basis. Specifically, the issues regarding Ms. Wagner's alleged denial of visitation rights to him; the suitability of appellant's own home when the children were permitted to come and visit with him; and, the parental alienation syndrome would no longer be issues available to be litigated. [FN1]

FN1. I, nevertheless, believe that the "denial of visitation" and "alienation syndrome" are irrelevant to any adoption issue, even under the current statute.

Unfortunately the law as now written seems to permit a second opportunity to litigate the rights of a non-consenting parent and to provide a forum for that parent to demonstrate that his shortcomings as a parent were not his fault.

In conclusion, I agree with the majority that the one year restriction on the evidence related to the best interest hearing was too limiting, and I reluctantly agree that evidence as to appellant's right to block any adoption process is admissible.

As to the third assignment regarding the need for inclusion of the appellant in the psychological evaluations, I agree that such evaluations were mandatory under the applicable former statute. However, that issue is waived as the appellant did not object at the trial court level. He did cross-examine the social worker vigorously as to his exclusion from the report, but he never objected to its admission on that basis. Neither did he request a continuance so that he could be included in such a report. Instead, he raises this issue for the first time on appeal. Further, I find it significant that the mandatory nature of this part of the statute has since been eliminated by the legislature.

I, therefore, would find no error on the part of the trial court in this regard.

Thus, I concur in judgment only as to the first and third assignments of error. In all other respects, I concur in the judgment and

analysis of the majority.

/s/ JUDGE JUDITH A. CHRISTLEY

STATE OF OHIO }
} SS.
COUNTY OF TRUMBULL }

IN THE COURT OF APPEALS, ELEVENTH DISTRICT IN RE: THE ADOPTION OF BENJAMIN MATTHEW WAGNER

FILED COURT OF APPEALS JUL 01 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

JUDGMENT ENTRY

CASE NO. 97-T-0224

For the reasons states in the Opinion of this court,it is judgment and order of this court that the judgment of the trial court is reversed and this matter is remanded for further proceedings consistent with this Opinion. All pending motions currently before this court are hereby overruled as moot. It is the further orderof this court that the parties equally share the costs of this proceeding.

/s/ JUDGE WILLIAM M. O'NEILL, FOR THE COURT

FORD, P.J., concurs with the first, second, fifth, sixth, eighth, and ninth assignments of error; concurs in judgment only as to the seventh assignment of error; dissents on the third and fourth assignments of error with Concurring/Dissenting Opinion,

CHRISTLEY, J., concurs with the second, fourth, fifth, sixth, seventh, eighth, and ninth assignments of error; concurs in judgment only as to the first and third assignments of error with Concurring Opinion.

THE SUPREME COURT OF OHIO

FILED DEC 22 1999 MARCIA J. MENGEL, CLERK SUPREME COURT OF OHIO

1999 TERM

In re: The Adoption of Emily Anna Wagner. Case No. 99-1427

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS: Docket Fee, $40.00, paid by Roger Juntunen. (Trumbull County Court of Appeals; No. 97T0223)

/s/ THOMAS J. MOYER Chief Justice 0027r122299

(Cite as: 87 Ohio St.3d 1474, 721 N.E.2d 120) In re Adoption of Wagner NO. 99-1427

Supreme Court of Ohio

December 22, 1999

DISMISSALS, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEALS, IF APPLICABLE, NOT ALLOWED

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned 'Supreme Court of Ohio Motion Tables'.)

Trumbull App. No. 97-T-0223. Ohio 1999.

THE SUPREME COURT OF OHIO

FILED OCT 27 1999 MARCIA J. MENGEL, CLERK SUPREME COURT OF OHIO

1999 TERM

In re: The Adoption of Benjamin Matthew Wagner. Case No. 99-1425

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS: Docket Fee, $40.00, paid by Roger Juntunen. (Trumbull County Court of Appeals; No. 97T0224)

/s/ THOMAS J. MOYER Chief Justice 0002r102799

(Cite as: 87 Ohio St.3d 1429, 718 N.E.2d 446) In re Adoption of Wagner NO. 99-1425

Supreme Court of Ohio

October 27, 1999

DISMISSALS, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEALS, IF APPLICABLE, NOT ALLOWED

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned 'Supreme Court of Ohio Motion Tables'.)

Trumbull App. No. 97-T-0224. Ohio 1999. In re Adoption of Wagner

STATE OF OHIO }
} SS.

COUNTY OF TRUMBULL }

IN THE COURT OF APPEALS, ELEVENTH DISTRICT IN RE: THE ADOPTION OF EMILY ANNA WAGNER

JUDGMENT ENTRY

CASE NO. 97-T-0223

FILED COURT OF APPEALS MAR 12 1998 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

Appellant, Roger Dale Juntunen, has moved this Court for various types of relief during the pendency of the instant appeal. First, he requests that the appealed judgment be stayed under App.R.7(A). Second, he requests that Appellee, Mark V. Wagner, be enjoined from taking any action which will stop appellant from exercising his visitation rights with the child, Emily Anna Wagner. Third, he requests that Appellee be enjoined from allowing the child from using the last name of "Wagner" at school.

A review of the appealed judgment indicates that Appellant is the natural father of the child. As part of the judgment, the trial court granted Appellee's petition to adopt the child. In support of this holding, the trial court expressly found that Appellant had failed to present any evidence indicating that the adoption would not be in the best interest of the child. The court also granted Appellee's request that the child's last name be changed from "Juntunen" to "Wagner".

In relation to the stay request, this Court would note that Appellant has stated that, prior to making the instant request, his stay motion before the trial court was denied; as a result, Appellant has complied with the procedural requirement for a stay under App.R. 7(A). Moreover, our review of the allegations in the motion and Appellee's response indicates that Appellant has made a prima facie showing that his substantive rights would be irreparably harmed if the stay was not granted; i.e., Appellant's parental rights would be damaged if he could not exercise them during the

pendency of this appeal. Thus, his request for a stay is granted.

As to Appellant's visitation request, this Court would indicate that our granting of the stay merely means that Appellant will merely be able to exercise any visitation rights which he was exercising pursuant to a valid court order prior to the issuance of the appealed judgment. This Court will not grant any additional visitation because the authority to grant such rights lies within the jurisdiction of a domestic relations court. Stated differently, the issuance of the stay will only allow Appellant to exercise those rights which he already has.

In relation to the "name change" request, we would note that the issuance of an injunction under App.R. 7(A) is not necessary because, as a result of the issuance of the stay, Appellee will not be allowed to take the legal steps necessary to change the child's last name. Accordingly, the child must continue to use the last name of "Juntunen" for all legal purposes during the pendency of this appeal.

Pursuant to the foregoing analysis, Appellant's motion to stay the appealed judgment is granted. Under this stay, Appellant shall have the right to visit the child in accordance with any valid visitation order which is presently pending. Furthermore, the child's legal name shall continue to be "Emily Anna Juntunen" during the pendency of this appeal.

Appellant's request for injunctive relief is denied.

/s/ PRESIDING JUDGE DONALD R. FORD, FOR THE COURT

CHRISTLEY, J., concurs.

STATE OF OHIO }
} SS.
COUNTY OF TRUMBULL }

IN THE COURT OF APPEALS, ELEVENTH DISTRICT IN RE: THE ADOPTION OF BENJAMIN MATTHEW WAGNER

JUDGMENT ENTRY

CASE NO. 97-T-0224

FILED COURT OF APPEALS MAR 12 1998 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

Appellant, Roger Dale Juntunen, has moved this Court for various types of relief during the pendency of the instant appeal. First, he requests that the appealed judgment be stayed under App.R.7(A). Second, he requests that Appellee, Mark V. Wagner, be enjoined from taking any action which will stop appellant from exercising his visitation rights with the child, Benjamin Matthew Wagner. Third, he requests that Appellee be enjoined from allowing the child from using the last name of "Wagner" at school.

A review of the appealed judgment indicates that Appellant is the natural father of the child. As part of the judgment, the trial court granted Appellee's petition to adopt the child. In support of this holding, the trial court expressly found that Appellant had failed to present any evidence indicating that the adoption would not be in the best interest of the child. The court also granted Appellee's request that the child's last name be changed from "Juntunen" to "Wagner".

In relation to the stay request, this Court would note that Appellant has stated that, prior to making the instant request, his stay motion before the trial court was denied; as a result, Appellant has complied with the procedural requirement for a stay under App.R. 7(A). Moreover, our review of the allegations in the motion and Appellee's response indicates that Appellant has made a prima facie showing that his substantive rights would be irreparably harmed if the stay was not granted; i.e., Appellant's parental rights would be damaged if he could not exercise them during the pendency of this appeal. Thus, his request for a stay is granted.

As to Appellant's visitation request, this Court would indicate that our granting of the stay merely means that Appellant will merely

be able to exercise any visitation rights which he was exercising pursuant to a valid court order prior to the issuance of the appealed judgment. This Court will not grant any additional visitation because the authority to grant such rights lies within the jurisdiction of a domestic relations court. Stated differently, the issuance of the stay will only allow Appellant to exercise those rights which he already has.

In relation to the "name change" request, we would note that the issuance of an injunction under App.R. 7(A) is not necessary because, as a result of the issuance of the stay, Appellee will not be allowed to take the legal steps necessary to change the child's last name. Accordingly, the child must continue to use the last name of "Juntunen" for all legal purposes during the pendency of this appeal.

Pursuant to the foregoing analysis, Appellant's motion to stay the appealed judgment is granted. Under this stay, Appellant shall have the right to visit the child in accordance with any valid visitation order which is presently pending. Furthermore, the child's legal name shall continue to be "Benjamin Matthew Juntunen" during the pendency of this appeal.

Appellant's request for injunctive relief is denied.

/s/ PRESIDING JUDGE DONALD R. FORD, FOR THE COURT

CHRISTLEY, J., concurs.

THE SUPREME COURT OF OHIO

FILED MAY 28 1997 MARCIA J. MENGEL, CLERK SUPREME COURT OF OHIO

In Re: Adoption of Emily Anna Wagner (Roger Juntunen, Appellant.)

1997 TERM

Case No. 97-502

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines to hear the case.

COSTS: Docket Fee, $40.00, paid by Michael A. Scala, Esq. (Trumbull County Court of Appeals; No. 95T5228)

/s/ THOMAS J. MOYER, Chief Justice 0070r052897

(Cite as: 78 Ohio St.3d 1516, 679 N.E.2d 311) In re Adoption of Wagner

NO. 97-502

Supreme Court of Ohio

May 28, 1997

DISCRETIONARY APPEALS NOT ALLOWED

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned 'Supreme Court of Ohio Motion Tables'.)

MOYER, C.J., PFEIFER and LUNDBERG STRATTON, JJ., dissent.

Ohio 1997. In re Adoption of Wagner

THE SUPREME COURT OF OHIO

FILED MAY 28 1997 MARCIA J. MENGEL, Clerk SUPREME COURT OF OHIO

In Re: Adoption of Emily Anna Wagner (Roger Juntunen, Appellant.)

1997 TERM

Case No. 97-504

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines to hear the case.

COSTS: Docket Fee, $40.00, paid by Michael A. Scala, Esq. (Trumbull County Court of Appeals; No. 95T5229)

/s/ THOMAS J. MOYER, Chief Justice 0070r052897

(Cite as: 78 Ohio St.3d 1516, 679 N.E.2d 311) In re Adoption of Wagner

NO. 97-504

Supreme Court of Ohio

May 28, 1997

DISCRETIONARY APPEALS NOT ALLOWED

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned 'Supreme Court of Ohio Motion Tables'.)

MOYER, C.J., PFEIFER and LUNDBERG STRATTON, JJ., dissent.

Ohio 1997. In re Adoption of Wagner

(Cite as: 117 Ohio App.3d 448, 690 N.E.2d 959) In re ADOPTION OF WAGNER. [FN*]

FN* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1997), 78 Ohio St.3d 1516, 679 N.E.2d 311.

Civil Appeal from Common Pleas Court Probate Division Case No. 94 ADP 057

JUDGMENT: Affirmed.

William R. Biviano, Warren, for appellant, Roger D. Juntunen.
Elise M. Burkey, Warren, for appellee, Mark Wagner.

COURT OF APPEALS, ELEVENTH DISTRICT, TRUMBULL COUNTY, OHIO IN RE: ADOPTION OF EMILY ANNA WAGNER CASE NO. 95-T-5228

FILED JAN 22 1997 TRUMBULL COUNTY PROBATE COURT WARREN, OHIO

OPINION JAN 17 1997

FILED COURT OF APPEALS JAN 21 1997 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

MAHONEY, J.

Respondent-appellant, Roger D. Juntunen ("appellant"), appeals from a judgment entry of the Probate Division of the Court of Common Pleas of Trumbull County, which held that his consent was not necessary for the adoption of his minor child, Emily (d.o.b. September 8, 1989), by her stepfather. Emily's mother, Deborah Wagner (f.k.a. Juntunen) appellant's former wife and now the wife of petitioner-appellee, Mark Wagner ("appellee"), had consented to the adoption.

On June 23, 1994, appellee filed a petition seeking to adopt Emily.

Appellee alleged that appellant's consent was not necessary, pursuant to R.C. 3107.07(A), because appellant had failed, without justifiable cause, to communicate with his daughter or to provide for her support for a period of at least one year immediately preceding the filing of the adoption petition. Because appellant contested the adoption, a hearing was conducted on December 15, 1994 to determine whether appellant's consent was required.

The testimony at that hearing established the following facts. Appellant and Deborah Wagner were married on June 21, 1986. Two children were born of that marriage, Benjamin (d.o.b. March 21, 1987) [FN1] and Emily.

FN1. The appeal of the matter of Benjamin's adoption is addressed in case No. 95-T-5229.

On July 15, 1991, the children's natural parents were granted a decree of dissolution in Howard County, Indiana. The dissolution decree provided for joint custody, designated Ms. Wagner as the residential parent, and ordered appellant to pay child support and to obtain health insurance coverage for his children. The Howard County court made its child-support award with the knowledge that appellant had recently become unemployed, having voluntarily resigned his commission as a captain with the United States Air Force in June 1991. He had been earning approximately $35,000 a year excluding his housing allowance. Finding that appellant, who holds a B.S. degree in mathematics and a master's degree in business administration, made insufficient plans to support his children when he quit his job with the Air Force, the decree ordered appellant to pay $150 per week in child support until further court order.

Subsequent to the divorce decree, Ms. Wagner moved to Ohio with the children and began to attend classes at Youngstown State University. On December 31, 1991, Ms. Wagner married appellee. Appellant remained unemployed until October 1991, when he began working for Electrolux as an independent contractor selling vacuum cleaners.

On October 28, 1991, appellant submitted a worksheet to the Indiana court seeking to reduce his child support payments to $84 per week. Ms. Wagner testified that appellant falsified that worksheet by asserting that she was working full-time and had income, when he knew that she was a full-time student with no income. Notwithstanding appellant's attempt to reduce his child-support obligation, the worksheet was never reduced to a court order lowering appellant's support obligation.

The evidence at the adoption trial revealed that, for the year prior to the filing of appellee's adoption petition, appellant's visitation and support of his children were sporadic. From June 23, 1993 to June 23, 1994, appellant saw his children a total of four times. Appellee and Ms. Wagner testified that the total time appellant spent with the children for that period was approximately three hours. During the same time period appellant paid $329.40 of the $7,800 that was due in child support. Appellant's total income for 1993, as reported in the most recent tax return available to the trial court, equaled $13,443.81.

Appellant testified that in addition to the support payments he did make, he also paid $53 per week for the children's health insurance coverage. However, Ms. Wagner testified that she was never notified about this coverage and that an earlier health insurance card she did receive from appellant was rejected when she attempted to use it.

On March 22, 1995, the trial court filed its judgment entry. The court found that "the mere payment of $329.40 in child support in the year immediately preceding the filing of the adoption proceeding does not constitute support where the natural father has been ordered to pay $600.00 per month in support." The trial court also stated that appellant's payments for health insurance did not constitute support when Ms. Wagner was not made aware of, and the children derived no benefit from, the coverage. The trial court further found, by clear and convincing evidence, that appellant's failure to pay support was not justified because appellant did not make an effort to find employment commensurate with his level of education. The trial court's judgment entry did not address

appellee's contention that appellant failed to communicate with the children. Based on its finding that appellant failed to support his children, the trial court concluded that appellant's consent was not necessary for the adoption to proceed [FN2] and ordered that a hearing as to the best interests of the children be scheduled.

FN2. A finding that a party's consent to an adoption is not required is a final appealable order. In re Adoption of Greer (1994), 70 Ohio St.3d 293, 638 N.E.2d 999, paragraph one of the syllabus.

Appellant filed a timely appeal and now asserts the following two assignments of error:

"1. The trial court's finding that appellant failed to provide for the maintenance and support of his minor child for a period of one-year preceding the filing of the adoption petition was against the manifest weight of the evidence.

"2. The trial court's finding that appellee proved by clear and convincing evidence that appellant failed to support his child without justifiable cause is against the manifest weight of the evidence and contrary to law."

Initially, we note that in determining whether a parent's consent is necessary for an adoption, R.C. 3107.07 provides:

"Consent to adoption is not required of any of the following:

"(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing,that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

Thus, appellant's consent to the adoption would be required if he provided maintenance and support for, and communicated with,

the child within one year prior to the filing of the adoption petition. Failure to either support or communicate with the child would abrogate the need for appellant's consent if the trial court also decides that such failure was without justifiable cause. See In re Adoption of Bovett (1987), 33 Ohio St.3d 102, 105, 515 N.E.2d 919, 923.

Because appellant faces the termination of his parental rights, the burden of proof is on the petitioner to establish by clear and convincing evidence that the natural parent failed to communicate with or support, without justifiable cause, his minor child during the one-year period prior to the adoption petition. In re Adoption of Masa (1986), 23 Ohio St.3d 163, 23 OBR 330, 492 N.E.2d 140. Once the petitioner has established a failure to either provide support for, or communicate with, the child, the burden of going forward with evidence shifts to the respondent to show some facially justifiable cause for such failure. Bovett, supra, at paragraph two of the syllabus.

As the trial court did not address appellant's alleged failure to communicate with the child, the only issue before this court is whether the trial court erred in finding that appellant failed, without justifiable cause, to provide maintenance and support for his child. The trial court's determination of this issue will not be disturbed on appeal unless this determination is against the manifest weight of the evidence. Id. at paragraph four of the syllabus. Consequently, the trial court's judgment will not be reversed if it is supported by some competent and credible evidence. Frankenmuth Mut. Ins. Co. v. Selz (1983), 6 Ohio St.3d 169, 6 OBR 227, 451 N.E.2d 1203.

In his first assignment of error, appellant argues that the trial court's determination that he failed to provide for the maintenance and support of his child was against the manifest weight of the evidence. Appellant asserts that the evidence showed that he made $329.40 in support payments during the year preceding the adoption petition in addition to $53 per week he paid to provide health care coverage for his children.

This case presents us with an opportunity to once again reexamine R.C. 3107.07(A). The recurring question that has continually presented itself to the appellate courts is: What percentage of support, from a parent's total support obligation, will the judicial system allow before a determination is made that a parent's consent is not necessary to allow an adoption to proceed. The lack of guidance from the Supreme Court of Ohio on this issue is glaring, as noted by Justice Douglas in his concurring opinion in Bovett, supra:

"[T]his case presents us with an opportunity to decide what the language of the statute means concerning support and/or communication during the critical one-year period. I agree that this initial determination should be made by the probate judge and his or her judgment should not be tampered with absent an abuse of discretion. What specific guidance needs to be given, however, is whether the making of one payment of support during the year or the sending of a Christmas card is enough to frustrate the operation of the statute. * * *

" * * * Until this court meets and decides that issue, inconsistent judgments of trial courts and courts of appeals on the question will continue to prevail." Id. at 107.

Thus far, the Supreme Court of Ohio has not set forth, as to the "maintenance and support" prong of R.C. 3107.07(A), any specific guidelines to resolve this issue. As a result of this lack of guidance, the reported appellate decisions on this issue show a lack of consistency. See, e.g., Celestino v. Schneider (1992), 84 Ohio App.3d 192, 616 N.E.2d 581 (holding that a single, partial payment of $36 within the one-year period prior to the filing of the adoption petition qualified as support and maintenance, requiring natural parent's consent as prerequisite to adoption); In re Adoption of Anthony (1982), 5 Ohio App.3d 60, 5 OBR 156, 449 N.E.2d 511 (holding that natural parent's consent for an adoption is required so long as the parent complies with the duty to support for any period during the one-year preceding the filing of the adoption petition); In re Adoption of Knight (1994), 97 Ohio App.3d 670, 647 N.E.2d 251 (holding that single, partial payment

of $20 within the one-year period prior to the filing of the adoption petition was de minimis and did not make natural parent's consent necessary for the adoption); In re Adoption of Carletti (1992), 78 Ohio App.3d 244, 604 N.E.2d 243 holding that single payment of $15, upon learning of stepparent's intention to adopt the child, did not constitute maintenance and support). However, this court has expressly held that the payment of "some" support is insufficient to satisfy this requirement when the natural parent had discretionary income which could have been used to pay additional support. In re Adoption of Cline (1993), 89 Ohio App.3d 450, 624 N.E.2d 1083. See, also, In re Adoption of Freel (June 14, 1996), Trumbull App. No. 95-T-5303, unreported, 1996 WL 648977.

In the case sub judice, appellant was obligated to pay $150 per week, or $7,800 a year, in child support. Appellant's total income for 1993, as reported in his tax return, equaled $13,443.81. However, during the same time period, appellant paid a total of $329.40, or less than three percent of his income, in support for his two children. While appellant's income may have not been enough to permit him to make full support payments, appellant earned enough money to make a greater contribution toward the support of his children. Furthermore, evidence existed that appellant, who has a B.S. degree in mathematics and a master's degree in business administration, failed to obtain employment commensurate with his level of education, a point appellant acknowledged when he admitted that selling vacuum cleaners, at approximately $13,000 a year, was not the best he could do. A parent is "not justified in electing a lifestyle that would assure his inability to pay support as ordered." In re Adoption of Deems (1993), 91 Ohio App.3d 552, 557, 632 N.E.2d 1347, 1350.

As to appellant's claim that he provided health insurance coverage for his child in addition to the $329.40 in "support" he paid, evidence was presented that he failed to reveal to Ms. Wagner the existence of such coverage. Additionally, an earlier health insurance card Ms. Wagner did receive from appellant was rejected when she attempted to use it. Because appellant's children derived no benefit as a result of appellant's concealment, these payments do not constitute maintenance and support. Knight, 97 Ohio

App.3d at 673, 647 N.E.2d at 253-254.

Based on the evidence presented before the trial court, sufficient evidence exists to support the trial court's decision that appellant failed, without justifiable cause, to provide maintenance and support for his child. Appellant's first assignment of error is without merit.

In the second assignment of error, appellant asserts that the trial court's judgment is contrary to the manifest weight of the evidence, as appellee failed to establish, by clear and convincing evidence, that he failed to support his child without justifiable cause. As previously discussed in appellant's first assignment of error, a review of the evidence presented reveals that appellee submitted sufficient facts from which the trial court could properly conclude that there was no justifiable reason for appellant's failure to provide support for his minor child. Accordingly, appellant's second assignment of error is without merit.

Based on the foregoing, the judgment of the trial court is affirmed.

/s/ JUDGE JOSEPH E. MAHONEY

CHRISTLEY, P.J., dissents with Dissenting Opinion,

DONOFRIO, J., Ret., Seventh Appellate District, sitting by assignment, concur.

COURT OF APPEALS, ELEVENTH DISTRICT, TRUMBULL COUNTY, OHIO IN RE: ADOPTION OF EMILY ANNA WAGNER Case No. 95-T-5228

DISSENTING OPINION

FILED COURT OF APPEALS JAN 21 1997 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

CHRISTLEY, P.J., dissenting.

I respectfully dissent from the opinion of the majority, as I do not feel that one of the two factors set out in R.C. 3107.07(A) was satisfied. In that provision, the legislature determined that the court must find "that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding * * *."

It is only if the court finds that there has been a failure of either support or visitation that the court is required to determine whether or not that failure was without "justifiable cause."

Here, there was $329.40 provided in support during the twelve months at issue. While I would agree that amount of money is insignificant from either a practical or moral standard, it is still a quantum leap from the $23.54 or $60 contributions which have been determined to be no support in previous cases from this district. Freel and Cline.

I agree wholeheartedly with the public policy arguments set out by appellee that such amounts are nothing short of laughable; however, the legislature has failed to define what amount or percentage would or would not constitute support. As a result, I am constrained to interpret this issue strictly. While there are some instances when the support may be so minuscule as to constitute no support, that level was not reached in this case.

Thus, in this instance, I believe that amount is sufficient to satisfy the support obligation as it is currently set out in R.C. 3107.07(A).

Having reached that conclusion, I find it irrelevant whether or not appellant had a justifiable reason for paying only that amount.

As to the health insurance issue, I agree that it should not be considered in determining whether or not support had been paid for the reasons set out in the majority opinion.

/s/ PRESIDING JUDGE JUDITH A. CHRISTLEY

STATE OF OHIO }
} SS.
COUNTY OF TRUMBULL }

IN THE COURT OF APPEALS, ELEVENTH DISTRICT MANDATE PROBATE 94 ADP 057 IN RE: ADOPTION OF EMILY ANNA WAGNER CASE NO. 95-T-5228

JUDGMENT ENTRY

FILED COURT OF APPEALS JAN 21 1997 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDGE JOSEPH E. MAHONEY

CHRISTLEY, P.J., dissents with Dissenting Opinion,

DONOFRIO, J., Ret., Seventh Appellate District, sitting by assignment, concur.

(Cite as: 1997 WL 51434 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In re Adoption of Benjamin Matthew WAGNER. No. 95-T-5229.

Court of Appeals of Ohio, Eleventh District, Trumbull County. Jan. 17, 1997.

Civil Appeal from Common Pleas Court Probate Division, Case No. 94 ADP 058

ATTY. WILLIAM R. BIVIANO 152 Elm Road, S.E. P.O. Box 790

Warren, OH 44483 (For Respondent-Appellant, Roger D. Juntunen) ATTY. ELISE M. BURKEY 200 Chestnut Avenue, N.E. Warren, OH 44482 (For Petitioner-Appellee, Mark Wagner)

COURT OF APPEALS, ELEVENTH DISTRICT, TRUMBULL COUNTY, OHIO IN RE: ADOPTION OF BENJAMIN MATTHEW WAGNER CASE NO. 95-T-5229

FILED JAN 22, 1997 TRUMBULL COUNTY PROBATE COURT WARREN, OHIO

JUDGMENT: Affirmed.

OPINION JAN 17 1997

FILED COURT OF APPEALS JAN 21 1997 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

MAHONEY, J.

Respondent-appellant, Roger Juntunen ("appellant"), appeals from a judgment entry of the Probate Division of the Court of Common Pleas of Trumbull County, which held that his consent was not necessary for the adoption of his minor child, Benjamin (d.o.b.3/21/87), by his stepfather. Benjamin's mother, Deborah Wagner (f.k.a.Juntunen), appellant's former wife and now the wife of petitioner-appellee, Mark Wagner ("appellee"), had consented to the adoption.

On June 23, 1994, appellee filed a petition seeking to adopt Benjamin. Appellee alleged that appellant's consent was not necessary because, pursuant to R.C. 3107.07(A), appellant had failed, without justifiable cause, to communicate with his son or to provide for his support for a period of at least one year immediately preceding the filing of the adoption petition. Because appellant contested the adoption, a hearing was conducted on December 15, 1994 to determine whether appellant's consent was required.

The testimony at that hearing established the following facts.

Appellant and Deborah Wagner were married on June 21, 1986. Two children were born from that marriage, Emily (d.o.b.9/8/89) [FN1] and Benjamin.

FN1. The appeal of the matter of Emily's adoption is addressed in 95-T-5228.

On July 15, 1991, the children's natural parents were granted a decree of dissolution in Howard County, Indiana. The dissolution decree provided for joint custody, designated Ms. Wagner as the residential parent, and ordered appellant to pay child support and to obtain health insurance coverage for his children. The Howard County Court made its child-support award with the knowledge that appellant had recently become unemployed, having voluntarily resigned his commission as a Captain with the United States Air Force in June of 1991. He had been earning approximately $35,000 a year excluding his housing allowance. Finding that appellant, who holds a B.S. degree in mathematics and a masters degree in Business Administration, made insufficient plans to support his children when he quit his job with the Air Force, the decree ordered appellant to pay $150 per week in child support until further court order.

Subsequent to the divorce decree, Ms. Wagner moved to Ohio with the children and began to attend classes at Youngstown State University. On December 31, 1991, Ms. Wagner married appellee. Appellant remained unemployed until October of 1991 when he began working for Electrolux as an independent contractor selling vacuum cleaners.

On October 28, 1991, appellant submitted a worksheet with the Indiana court seeking to reduce his child support payments to $84 per week. Ms. Wagner testified that appellant falsified that worksheet by asserting that she was working full-time and had income, when he knew that she was a full-time student with no income. Notwithstanding appellant's attempt to reduce his child support obligation, the worksheet was never reduced to a court order lowering appellant's support obligation.

The evidence at the adoption trial revealed that, for the year prior to the filing of appellee's adoption petition, appellant's visitation and support of his children was sporadic. From June 23, 1993 to June 23, 1994, appellant saw his children a total of four times. Appellee and Ms. Wagner testified that the total time appellant spent with the children for that period totaled approximately three hours. During the same time period, appellant paid $329.40 of the $7,800 that was due in child support. Appellant's total income for 1993, as reported in the most recent tax return available to the trial court, equaled $13,443.81.

Appellant testified that in addition to the support payments he did make, he also paid $53 per week for the children's health insurance coverage. However, Ms. Wagner testified that she was never notified about this coverage and that an earlier health insurance card she did receive from appellant was rejected when she attempted to use it.

On March 22, 1995, the trial court filed its judgment entry. The court found that "the mere payment of $329.40 in child support in the year immediately preceding the filing of the adoption proceeding does not constitute support where the natural father has been ordered to pay $600.00 per month in support." The trial court also stated that appellant's payments for health insurance did not constitute support when Ms. Wagner was not made aware of, and the children derived no benefit from, the coverage. The trial court further found, by clear and convincing evidence, that appellant's failure to pay support was not justified because appellant did not make an effort to find employment commensurate with his level of education. The trial court's judgment entry did not address appellee's contention that appellant failed to communicate with the children. Based on its finding that appellant failed to support his children, the trial court concluded that appellant's consent was not necessary for the adoption to proceed [FN2] and ordered that a hearing as to the best interests of the children be scheduled.

FN2. A finding that a party's consent to an adoption is not required is a final appealable order. In re Adoption of Greer (1994), 70 Ohio St.3d 293, paragraph one of the syllabus.

Appellant filed a timely appeal and now asserts the following two assignments of error:

"1. The trial court's finding that appellant failed to provide for the maintenance and support of his minor child for a period of one-year preceding the filing of the adoption petition was against the manifest weight of the evidence.

"2. The trial court's finding that appellee proved by clear and convincing evidence that appellant failed to support his child without justifiable cause is against the manifest weight of the evidence and contrary to law."

Initially, we note that in determining whether a parent's consent is necessary for an adoption, R.C. 3107.07 provides:

"Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

Thus, appellant's consent to the adoption would be required if he provided maintenance and support for, and communicated with, the child within one year prior to the filing of the adoption petition. Failure to either support or communicate with the child would abrogate the need for appellant's consent if the trial court also decides that such failure is without justifiable cause. See In re Adoption of Bovett (1987), 33 Ohio St.3d 102, 105.

Because appellant faces the termination of his parental rights, the burden of proof is on the petitioner to establish by clear and convincing evidence that the natural parent failed to communicate

with or support, without justifiable cause, his minor child during the one-year period prior to the adoption petition. In re Adoption of Masa (1986), 23 Ohio St.3d 163. Once the petitioner has established a failure to either provide support for, or communicate with, the child, the burden of going forward with evidence shifts to the respondent to show some facially justifiable cause for such failure. Bovett, supra, at paragraph two of the syllabus.

As the trial court did not address appellant's alleged failure to communicate with the child, the only issue before this court is whether the trial court erred in finding that appellant failed, without justifiable cause, to provide maintenance and support for his child. The trial court's determination of this issue will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. Id. at paragraph four of the syllabus. Consequently, the trial court's judgment will not be reversed if it is supported by some competent and credible evidence. Frankenmuth Mut. Ins. Co. v. Selz (1983), 6 Ohio St.3d 169.

In his first assignment of error, appellant argues that the trial court's determination that he failed to provide for the maintenance and support of his child was against the manifest weight of the evidence. Appellant asserts that the evidence showed that he made $329.40 in support payments during the year preceding the adoption petition in addition to $53.00 per week he paid to provide health care coverage for his child.

This case presents us with an opportunity to once again reexamine R.C. 3107.07(A). The recurring question that has continually presented itself to the appellate courts is: what percentage of support, from a parent's total support obligation, will the judicial system allow before a determination is made that a parent's consent is not necessary to allow an adoption to proceed. The lack of guidance from the Supreme Court of Ohio on this issue is glaringly missing, as noted by Justice Douglas in his concurring opinion in Bovett, supra:

"[T]his case presents us with an opportunity to decide what the

language of the statute means concerning support and/or communication during the critical one-year period. I agree that this initial determination should be made by the probate judge and his or her judgment should not be tampered with absent an abuse of discretion. What specific guidance needs to be given, however, is whether the making of one payment of support during the year or the sending of a Christmas card is enough to frustrate the operation of the statute. * * * "

" * * * Until this court meets and decides that issue, inconsistent judgments of trial courts and courts of appeals on the question will continue to prevail." Id. at 107.

Thus far, the Supreme Court of Ohio has not set forth, as to the "maintenance and support" prong of R.C. 3107.07(A), any specific guidelines to resolve this issue. As a result of this lack of guidance, the reported appellate decisions on this issue show a lack of consistency. See, e.g. Celestino v. Schneider (1992), 84 Ohio App.3d 192 (holding that a single, partial payment of $36 within the one-year period prior to the filing of the adoption petition qualified as support and maintenance, requiring natural parent's consent as prerequisite to adoption); In re Adoption of Anthony (1982), 5 Ohio App.3d 60 (holding that natural parent's consent for an adoption is required so long as the parent complies with the duty to support for any period during the one year preceding the filing of the adoption petition); In re Adoption of Knight (1994), 97 Ohio App.3d 670 (holding that a single, partial payment of $20 within the one-year period prior to the filing of the adoption petition was de minimis and did not make natural parent's consent necessary for the adoption); In re Adoption of Carletti (1992), 78 Ohio App.3d 244 (holding that single payment of $15, upon learning of stepparents intention to adopt the child, did not constitute maintenance and support). However, this court has expressly held that the payment of "some" support is insufficient to satisfy this requirement when the natural parent had discretionary income which could have been used to pay additional support. In re Adoption of Cline (1993), 89 Ohio App.3d 450. See, also, In re Adoption of Freel (June 14, 1996), Trumbull App. No. 95- T-5303, unreported.

In the case sub judice, appellant was obligated to pay $150 per week, or $7,800 a year, in child support. Appellant's total income for 1993, as reported in his tax return, equaled $13,443.81. However, during the same time period, appellant paid a total of $329.40, or less than three percent of his income, in support for his two children. While appellant's income may have not been enough to permit him to make full support payments, appellant earned enough money from which to make a greater contribution toward the support of his children. Furthermore, evidence existed that appellant, who has a B.S. degree in mathematics and a masters degree in Business Administration, failed to obtain employment commensurate with his level of education. A point appellant acknowledged when he admitted that selling vacuum cleaners, at approximately $13,000 a year, was not the best he could do. A parent is "not justified in electing a lifestyle that would assure his inability to pay support as ordered." In re Adoption of Deems (1993), 91 Ohio App.3d 552, 557.

As to appellant's claim that he provided health insurance coverage for his child, in addition to the $329.40 in "support" he paid, evidence was presented that he failed to reveal to Ms. Wagner the existence of such coverage. Additionally, an earlier health insurance card Ms. Wagner did receive from appellant was rejected when she attempted to use it. Because appellant's child derived no benefit as a result of appellant's concealment, these payments do not constitute maintenance and support. Knight, at 673.

Based on the evidence presented before the trial court, sufficient evidence exists to support the trial court's decision that appellant failed, without justifiable cause, to provide maintenance and support for his child. Appellant's first assignment of error is without merit.

In the second assignment of error, appellant asserts that the trial court's judgment is contrary to the manifest weight of the evidence as appellee failed to establish, by clear and convincing evidence, that he failed to support his child without justifiable cause. As previously discussed in appellant's first assignment of error, a

review of the evidence presented reveals that appellee submitted sufficient facts from which the trial court could properly conclude that there was no justifiable reason for appellant's failure to provide support for his minor child. Accordingly, appellant's second assignment of error is without merit.

Based on the foregoing, the judgment of the trial court is affirmed.

/s/ JUDGE JOSEPH E. MAHONEY

CHRISTLEY, P.J., dissents with Dissenting Opinion,

DONOFRIO, J., Ret., Seventh Appellate District, sitting by assignment, concur.

COURT OF APPEALS, ELEVENTH DISTRICT, TRUMBULL COUNTY, OHIO IN RE: ADOPTION OF BENJAMIN MATTHEW WAGNER Case No. 95-T-5229

DISSENTING OPINION

FILED COURT OF APPEALS JAN 21 1997 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

CHRISTLEY, P.J., dissenting.

I respectfully dissent from the opinion of the majority, as I do not feel that one of the two factors set out in R.C. 3107.07(A) was satisfied. In that provision, the legislature determined that the court must find "that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding * * *."

It is only if the court finds that there has been a failure of either support or visitation that the court is required to determine whether or not that failure was without "justifiable cause."

Here, there was $329.40 provided in support during the twelve

months at issue. While I would agree that amount of money is insignificant from either a practical or moral standard, it is still a quantum leap from the $23.54 or $60 contributions which have been determined to be no support in previous cases from this district. Freel and Cline.

I agree wholeheartedly with the public policy arguments set out by appellee that such amounts are nothing short of laughable; however, the legislature has failed to define what amount or percentage would or would not constitute support. As a result, I am constrained to interpret this issue strictly. While there are some instances when the support may be so minuscule as to constitute no support, that level was not reached in this case.

Thus, in this instance, I believe that amount is sufficient to satisfy the support obligation as it is currently set out in R.C. 3107.07(A).

Having reached that conclusion, I find it irrelevant whether or not appellant had a justifiable reason for paying only that amount.

As to the health insurance issue, I agree that it should not be considered in determining whether or not support had been paid for the reasons set out in the majority opinion.

/s/ PRESIDING JUDGE JUDITH A. CHRISTLEY

STATE OF OHIO }
} SS.
COUNTY OF TRUMBULL }

IN THE COURT OF APPEALS, ELEVENTH DISTRICT MANDATE PROBATE 94 ADP 058 IN RE: ADOPTION OF BENJAMIN MATTHEW WAGNER

CASE NO. 95-T-5229

JUDGMENT ENTRY

FILED COURT OF APPEALS JAN 21 1997 TRUMBULL

COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDGE JOSEPH E. MAHONEY

CHRISTLEY, P.J., dissents with Dissenting Opinion,

DONOFRIO, J., Ret., Seventh Appellate District, sitting by assignment, concur.

(MOST RECENT APPELLATE OPINION AND JUDGMENT IN THESE CASES:)

FILED COURT OF APPEALS DEC 27 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

COURT OF APPEALS, ELEVENTH DISTRICT TRUMBULL COUNTY, OHIO

IN RE: THE ADOPTION OF EMILY ANNA WAGNER AND BENJAMIN MATTHEW WAGNER

J U D G E S

HON. DONALD R. FORD, P.J., HON. JUDITH A. CHRISTLEY, J. HON. WILLIAM M. O'NEILL, J.

CASE NOS. 99-T-0104 and 99-T-O105

MEMORANDUM OPINION
CHARACTER OF PROCEEDINGS: Civil Appeals from the Court of Common Pleas, Probate Division Case Nos. 94 ADP 057 and 94 ADP 058

JUDGMENT: Appeals dismissed.

ROGER JUNTUNEN, Pro Se 649 Lloyd Street Hubbard, OH 44425 (Appellant)

ATTY. ELISE M. BURKEY 200 Chestnut Avenue, N.E. Warren, OH 44483-5805 (For Appellee/Mark V. Wagner)

O'NEILL, J.

On August 6,1999, appellant, Roger Juntunen, filed Notices of Appeal from a July 13, 1999 trial court judgment entry setting a date for a hearing on a best interest determination with respect to the adoption of his children, Emily and Benjamin, by their stepfather, appellee, Mark V. Wagner. Previously, this court affirmed the trial court's determination that appellee did not need the consent of appellant, Emily and Benjamin's natural father, for his petition of adoption to go forward. See In re Adoption of Wagner (1997), 117 Ohio App.3d 448, discretionary appeal not allowed (1997), 78 Ohio St.3d 1516 ("Wagner I"). However, based on errors committed by the trial court in preventing appellant from fully participating at the hearing held to determine the best interest of the children, we reversed the trial court's "best interest" determination and remanded the matter for further proceedings consistent with our opinion. In re Adoption of Wagner (June 30,1999), Trumbull App. Nos. 97-T-0223 and 97-T-0224, unreported, ("Wagner II").

Appellant asserts within his current Notices of Appeal that this court reversed the trial court's prior decisions (Wagner II) with respect to the entire two-step adoption process, not just the "best interest" determination. Consequently, appellant is seeking review of the trial court's judgment entry setting a date to hear additional evidence relevant to the best interest determination. The matter is now before this court to determine, sua sponte, whether the judgment presently on appeal is a final appealable order.

This court may only consider final orders. See Noble v. Colwell (1989), 44 Ohio St.3d 92. R.C. 2505.02 defines a final order as follows:

"(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when itis one of the following:

"(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

"(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

"(3) An order that vacates or sets aside a judgment or grants a new trial;

"(4) An order that grants or denies a provisional remedy and to which both of the following apply:

"(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

"(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

"(5) An order that determines that an action may or may not be maintained as a class action."

The trial court's judgment entry setting a hearing date for the presentation of evidence regarding the best interest determination canin no way be construed as "final" because it does not, pursuant to R.C. 2505.02(B)(1), "determine the action and prevent a judgment." Further, the order does not fit into any of the other R.C. 2505.02 categories of final appealable orders. In the absence of a final appealable order, this court lacks jurisdiction to entertain these appeals.

Finally, we repeat the the scope of our reversal in Wagner II dealt

solely with the issue concerning procedural errors in the trial court's best interest of the children determination. Any issues with respect to the "consent" phase ofthe adoption are barred under the doctrine of res judicata and/or law of the case.

For the foregoing reasons, the appeals are, sua sponte, dismissed.

/s/ JUDGE WILLIAM M. O'NEILL

FORD, P.J., CHRISTLEY, J., concur.

STATE OF OHIO }
} SS.
COUNTY OF TRUMBULL }

IN THE COURT OF APPEALS, ELEVENTH DISTRICT IN RE: THE ADOPTION OF EMILY ANNA WAGNER AND BENJAMIN MATTHEW WAGNER

CASE NOS. 99-T-0104 and 99-T-0105

JUDGMENT ENTRY

FILED COURT OF APPEALS DEC 27 1999 TRUMBULL COUNTY, OHIO MARGARET R. O'BRIEN, Clerk

For the reasons stated in the Memorandum Opinion of this court, the appeals are hereby dismissed.

/s/ JUDGE WILLIAM M. O'NEILL, FOR THE COURT

(TRUMBULL COUNTY PROBATE COURT GRANTING OF FINAL DECREE OF ADOPTION IN BEST INTEREST OF CHILD JUDGMENT:)

IN THE COURT OF COMMON PLEAS, PROBATE DIVISION TRUMBULL COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF EMILY ANNA

WAGNER AND BENJAMIN MATTHEW WAGNER CASE NO. 94 ADP 057 and 94 ADP 058

JUDGMENT ENTRY

FILED NOV 05 1997 TRUMBULL COUNTY PROBATE COURT WARREN, OHIO

This cause came on to be heard on September 30, 1997 on the petition of Mark V. Wagner to adopt his stepchildren, Emily Anna Juntenun and Benjamin Matthew Juntunen, and the objection of the birth father, Roger Juntunen,to the adoption. Elise M. Burkey, Esq. appeared on behalf of the Petitioner. The birth father was not represented by counsel.

The issue to be determined is whether these adoptions are in the best interests of the children. A person who contests an adoption has the burden of providing the Court material evidence needed to determine what is in the best interest of the child and must establish that the child's current placement is not the least detrimental available alternative. R.C. 3107.161.
Mr. Juntunen failed to meet this burden. Other evidence indicates that the
proposed adoptions are in the best interest of the children. Mrs. Annette Weimer of the Trumbull County Children's Services Board testified that both children feel strong attachments to Mr. Wagner, while their memories of Mr. Juntunen are not as positive. She reported that both children are quite anxious for the adoption to occur, already use the last name Wagner in church and school, and refer to Mr. Wagner as "Daddy".

Deborah Wagner testified that Mr. Wagner is a wonderful father to the children. He participates in their important events,is active in sports and church activities with them and has provided for the children financially emotionally [sic] since their marriage in 1991. According to Mrs. Wagner, Emily does not know of any other "dad" but Mr. Wagner.

Mr. Wagner testified that his initial bond with the children was

like "magic" and that they have been like family since the beginning. He described the children as very affectionate to him. He participates in the children's school functions and the family attends church together regularly.

Mr. Wagner noted that the children have had perfect attendance in Sunday
school for the last three years and that Benjamin likes to work with Mr. Wagner in his woodshop.

Clyde Wagner, father of Mark Wagner, stated that he and his wife consider Benjamin and Emily as their grandchildren and do a lot of activities with them. The extended family attends church andn [sic] gathers together every Sunday for dinner.

While Mr. Juntunen has challenged each of the witnesses' opinions, he failed to offer any evidence to the contrary. He has failed to meet the burden of establishing that the adoptions are not in the children's best interest and that [sic] children's current placement is not the least detrimental available alternative. Based upon the testimony and the recommendations of the Trumbull County Children's Services Board, the Court finds by clear and convincing evidence that the adoptions of Benjamin and Emily Juntunen by their stepfather, Mark Wagner, are in their best interests and therefore grants the petitions for adoption and the requested name changes.

DATE NOV 05 1997

/s/ JUDGE THOMAS A. SWIFT

Copies mailed this ___ day of November, 1997 to:

Elise M. Burkey, Esq. Roger Juntunen

(TRUMBULL COUNTY PROBATE COURT DETERMINATION OF CONSENTS NOT REQUIRED JUDGMENT:)

IN THE COURT OF COMMON PLEAS, DIVISION OF PROBATE TRUMBULL COUNTY, OHIO

IN THE MATTER OF: THE ADOPTION OF EMILY ANNA WAGNER AND BENJAMIN MATTHEW WAGNER

CASE NO. 94 ADP 057 and 94 ADP 058

JUDGMENT ENTRY

FILED MAR 22 1995 JUDGE THOMAS A. SWIFT Probate Court Trumbull County Warren, Ohio

This cause came on to be heard on December 15, 1994, on the petition of Mark V. Wagner to adopt his stepchildren, Emily Anna Juntunen and Benjamin Matthew Juntunen, and the objection of the natural father, Roger Juntunen, to the adoption. Daniel N. Gerin, Esq., appeared on behalf of the natural father, and Susan Porter Collins, Esq., appeared on behalf of the Petitioner. The issue before the Court is whether or not the consent of the natural father is necessary for this adoption to proceed pursuant to R.C. 3107.07.

The court finds from the evidence presented that the natural parents were divorced on July 15, 1991 in Howard County, Indiana. The divorce decree ordered the natural father to pay child support in the amount of $150.00 per week for the minor children and a portion of the child care and medical expenses. Prior to the divorce, Roger Juntunen volutarily resigned from the United States Air Force. The child support award was made with the Howard County Circuit's knowledge of Roger Juntunen's unemployment. The Howard County Court found that he had "made inadequate plans for income to support the children prior to his resignation."

The Court finds that Mr. Juntunen has an undergraduate degree in mathematics and a Masters in Business Administration (MBA). The Court further finds that Mr. Juntunen earned $35,000.00 per year plus a housing allowance when he served in the military. In the one year immediately preceding the filing of the adoption, Mr. Juntunen was employed with the Electrolux Corporation in management and as an independent contractor vacuum cleaner sales.

During the one year immediately preceding the filing of the adoption petition, Mr. Juntunen earned approximately $13,000.00. The Court further finds that during this time, Mr. Juntunen paid $329.40 in child support through the Howard County Court, and that child support arrearages exceed $22,000.00 not including child care or medical expenses. The Court further finds that Mr. Juntunen had acquired health insurance for the minor children but failed to communicate this fact to the children's mother.

R.C. 3107.07(A) provides that "[c]onsent to adoption is not required of . . . a parent of a minor, when it is alleged in the adoption petition and the Court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

The first dispositive issue in this case is whether the fact that Mr. Juntunen made support payments in the amount of $329.40 during the one year immediately preceding the filing of the adoption peitition prevents a finding that he failed "to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding . . . the filing of the adoption petition." R.C. 3107.07(A) requires strict construction to protect the interests of the non-consenting parent, and where the record indicates that a parent made some contribution, although meager, within the one year immediately preceding the filing of the adoption petition, then he has not failed to provide support as required by law or judicial decree, for one year. In re Adoption of Salisbury (1982), 5 Ohio App.3d 65. See also In re Adoption of Anthony (1982), 5 Ohio App.3d 60; and In re Adoption of Dea (March 25,1994), Lake App. No. 92-L-120, unreported.

The Court being fully advised in the premises finds by clear and convincing evidence that the mere payment of $329.40 in child support in the one year immediately preceding the filing of the

adoption petition does not constitute support where the natural father has been ordered to pay $600.00 per month in support. The Court further finds that the provision of medical insurance does not constitute support when the custodial parent is not aware of said coverage and thus no benefit inures to the children.

As the Court has found that the natural parent has failed to support the children for the requisite one-year period, the Court now addresses the issue of whether this failure was without justifiable cause.

"Under R.C. 3107.07(A), the probate court shall determine the issue of justifiable cause by weighing the evidence of the natural parent's circumstances for the statutory period for which he or she failed to provide support. The court shall determine whether the parent's failure to support the child for that period as a whole (and not just a portion thereof) was without justifiable cause.

"The question of whether a natural parent's failure to support his or her child has been proven by the petitioner by clear and convincing evidence to have been without justifiable cause is a determination for the probate court, and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. (In re Adoption of Masa [1986], 23 Ohio St. 3d 163, 23 OBR 330, 492 N.E. 2d 140, paragraph two of the syllabus, followed.)", In re Adoption of Bovett (1987), 33 Ohio St. 3d 102 (paragraph three and four of the syllabus).

A natural parent has a "moral and legal obligation to help financially with his progeny." "Support of one's children should rank as one of the highest priorities." In re Adoption of Cline (1993), 89 Ohio App. 3d 450; In re Adoption of Rantamaki (Mar. 30, 1990), Ashtabula App. No. 88-A-1422, unreported. "Public policy dictates that a parent has a duty to take care of his children," and that this duty should be pursued diligently. Allen v. Allen (1988), 59 Ohio App. 3d 54. The voluntary termination of gainful employment is not justification or excuse for not contributing to the support of one's children. The election of a lifestyle that assures an inability to pay support is not a justifiable cause for failing to

support. In re Adoption of Deems (1993), 91 Ohio App. 3d 552; Baker v. Grathwohl (1994), 97 Ohio App. 3d 116.

The Court being fully advised in the premises finds by clear and convincing evidence that Mr. Juntunen's voluntary termination of employment with the United States Air Force when he had no viable plan to support his children, and his election of employment that is not commensurate with his level of education and skills does not constitute justifiable cause for failing to support his children. The Court further finds that Mr. Juntunen has failed to make a diligent and substantial effort to obtain employment commensurate with his level of education and skill from the time of his divorce to the filing of the adoption petition and that said failure was not justifiable cause.

Therefore, it is ORDERED that the consent of natural father is not necessary for this adoption to proceed pursuant to R.C. 3107.07(A). The Court further finds that there is no just cause for delay pursuant to Civ. R. 54(B).

Further, it is ORDERED that the hearing on the best interests of the adoption of the children is scheduled before this Court on Wednesday, April 26, 1995 at 10:00 o'clock a.m.

/s/ Thomas A. Swift Probate Judge

Copies mailed this ___ day of March, 1995 to:

Susan Porter Collins, Esq. Daniel N. Gerin, Esq.

(STATE OF INDIANA CHILD SUPPORT ORDER ORIGINAL MODIFICATION FILED PURSUANT TO JULY 15, 1991, STATE OF INDIANA DISSOLUTION DECREE ORDER:)

106234

STATE OF INDIANA }
} SS:
COUNTY OF HOWARD }

IN RE THE MARRIAGE OF: ROGER DALE JUNTUNEN AND DEBORA JANINE JUNTUNEN

IN THE HOWARD SUPERIOR COURT I

FILED OCT 28 1991 CLERK HOWARD SUPERIOR COURT, DIVISION 1

CAUSE NO. 34D01-9011-DR-00521

WORKSHEET-CHILD SUPPORT OBLIGATION

BENJAMIN MATTHEW JUNTUNEN, BORN MARCH 21, 1987. AND EMILY ANNA JUNTUNEN, BORN SEPTEMBER 8, 1989

	FATHER	MOTHER	COMBINED
1. WEEKLY GROSS INCOME	221.98	174.00	395.98
SUPPORT COURT ORDER	.00	.00	.00
SUPPORT LEGAL DUTY	.00	.00	.00
HEALTH INS. PREM/CHILD	16.00	.00	.00
MAINTENANCE PAID	.00	.00	.00
2. WEEKLY AVAILABLE INCOME	205.98	174.00	379.98
3. % SHARE OF INCOME	54%	46%	
4. BASIC CHILD SUPPORT	116.00		
CHILD CARE COSTS	40.00		
EXTRAORDINARY HEALTHCARE			.00
EXTRAORDINARY EDUCATION			.00
5. TOTAL SUPPORT OBLIGATION			156.00

6. EACH PARENT'S SUPPORT OBLIG. 84.00 72.00 7. RECOMMENDED SUPPORT 84.00 72.00

I AFFIRM, UNDER PENALTIES FOR PERJURY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

DATED THIS 8TH DAY OF OCTOBER, 1991.

/s/ ROGER DALE JUNTUNEN, FATHER

David H. Williams WILLIAMS & RYAN 123 West Sycamore Street P.O. Box 935 Kokomo, IN 46903-0935 (317) 457-6601

(STATE OF INDIANA DISSOLUTION DECREE & ORIGINAL CHILD SUPPORT ORDER:)

STATE OF INDIANA }
} SS:
COUNTY OF HOWARD }

IN THE HOWARD SUPERIOR COURT I 1991 TERM

FILED JUL 15 1991 Clerk Howard Superior Court, DIVISION 1

IN RE THE MARRIAGE OF: ROGER DALE JUNTUNEN, PETITIONER AND DEBORA JANINE JUNTUNEN, RESPONDENT

CIVIL CAUSE NO. 34-D01-9011-DR-00521

DISSOLUTION DECREE

The Court having taken this matter under advisement, now finds that the marriage is irretrievably broken and it should be and herebyis dissolved.

The Court finds that the Husband has voluntarily terminated and resigned from the United States Air Force and that such resignation was to be effective June 18, 1991. The Court further finds

that the Petitioner, husband, had made inadequate plans for income to support the children prior to such resignation. Therefore, the Court orders that he is to pay for the support of these children, the sum of $150.00 per week, beginning, friday [sic], July 19, 1991, and each Friday thereafter until further order of this court.

And the Court having heard evidence and being duly advised in the premises, finds as follows:

1. That Husband and Wife shall have joint custody of the children of the parties with Wife having physical custody of said Benjamin Matthew Juntunen, born March 21, 1987, and Emily Anna Juntunen, born September 8, 1989. That the parties shall have joint custody of their children Benjamin Matthew Juntunen and Emily Anna Juntunen respecting their access to information regarding their children's school and medical records, school and health care decisions, and religious upbringing. Wife shall be the residential custodial parent with whom said children shall make their home. As soon as Husband is employed making more than minimum wage, he shall, without notice from the Court, provide a Worksheet-Child Support Obligation Schedule and pay said support obligation. Husband shall be able to visit with the minor children at all reasonable times and places.

2. That Husband and Wife shall sell the real estate of the parties, commonly known as 115 South Indiana, Kokomo, Indiana, and 1811 Cheyenne Place, Cheyenne, Wyoming, and pay all the debts of the parties, in the following manner: mortgages, Citibank credit card, Sears credit card, Northeast Bank personal loan, Warren Federal credit card, and United Services credit card. In the event that there is any balance remaining after said payments are made, then in that event, the parties shall divide the net proceeds equally between them.

a. Husband shall pay the indebtedness on said 115 South Indiana, Kokomo, Indiana, at Bowest Mortgage and hold Wife harmless until said real estate has been sold. Husband shall receive credit for any reduction of principal payments made by him after said

Decree of the Court and before the sale of said real estate, in the division of the net proceeds, if any.

b. Husband shall pay the indebtedness on said 1811 Cheyenne Place, Wyoming, at Fleet Mortgage and hold Wife harmless until said real estate has been sold. Husband shall receive credit for any reduction of principal payments made by him after said Decree of the Court and before the sale of said real estate, in the division of the net proceeds, if any.

3. The Court having considered the personal items of the parties now finds that it is unable to determine a value of these item, and therefore, the Court orders that the parties conduct a two-party auction and pay the costs thereof using David Williams as the clerk of the auction and auctioneer and that the parties bid on the items they wish to have to arrive at a reasonable value of the items, and that any final accounting disparity values be either deducted from the property settlement judgment or added thereto to equalize the value of the property

Husband shall keep a certain 1989 Chevy as his separate property, subject to the indebtedness thereon which he shall pay and hold Wife harmless. Wife shall keep a certain 1979 Ford as her separate property; said automobile is free and clear of any liens.

5. Wife shall pay a certain Fashion Bug credit card, Citibank credit card, and a Sears credit card, and hold Husband harmless thereon. Husband shall pay a certain Fleet Mortgage, Bowest Mtg., First of America auto loan, Northeast Bank personal loan, United Services credit card, and a Warren Federal credit card, and hold Wife harmless thereon.

6. Husband shall assume and hold Wife harmless on any debts incurred by him after the 20th day of November, 1990;

7. Wife shall assume and hold Husband harmless on the unpaid balance on any debts incurred by her after the 20th day of November, 1990;

8. The Court now finds that Husband shall pay a portion of Wife's attorney fees in the sum of one thousand dollars ($1000.00) within 60 days of the date of this Decree.

9. Court now finds that this marriage had a duration of approximately four (4) years and that at the time of this marriage, the Petitioner, husband, was receiving Masters of Business Administration while in the United States Air Force. The Respondent, wife, is now a student at Indiana University attempting to obtain a decree in elementary educcation [sic] and is requesting rehabilitative maintenance in the form of partial repayment of the cost of that education. Court finds that this marriage was of short duration; however, this marriage resulted in the birth of two (2) children which makes it more difficult for the custodial parent to support said children and pursue an education. Court therefore orders the Petitioner to pay a portion of said cost of that education in the sum of 25% of the charges for tuition, fees and books so long as the Respondent is maintaining satisfactory progress as determined by the university towards obtaining a degree.

10. Each party will pay one-half (1/2) of all reasonable medical, dentical [sic], optical and hospitalization expenses on behalf of the children not covered by insurance. The Court orders Petitioner to obtain reasonable medical insurance for the benefit of said children as soon as possible after becoming fully employed.

11. The Court finds that all payments of support and rehabilitative maintenance, medical expenses and attorney fees are in the form of support.

12. Costs to the Petitioner.

SO ORDERED THIS 15TH DAY OF JULY, 1991.

/s/ DENNIS H. PARRY, JUDGE, HOWARD SUPERIOR COURT 1

(UNPUBLISHED CASES CITED IN THE OPINIONS OF THE COURTS IN THESE CASES (IN ALPHABETICAL ORDER):)

AIKEN

(Cite as: 1992 WL 63389 (Ohio App. 2 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In the Matter of the ADOPTION OF Holly Nicole AIKEN. No. 12522.

Court of Appeals of Ohio, Second District, Montgomery County. March 30, 1992.

A. Melvin Kemmer, Troy, for petitioner. David E. Larson, Kettering, for Natural Father.

OPINION

GRADY, Judge.

Russell C. Bailey appeals from the judgment of the Probate Division of the Court of Common Pleas, which granted the petition of Appellee Timothy Herbert Aiken to adopt Bailey's natural child, Holly Nicole Bailey. For reasons more fully stated below, the judgment of the trial court will be affirmed.

FACTS

The marriage of Appellant Russell Bailey and Jill Bailey was terminated by dissolution in 1986. Custody of the parties' only child, Holly, was granted to Jill. Russell was ordered to pay $35 per week as child support.

In November, 1987, Jill Bailey married Timothy Aiken. In February 1988, Timothy Aiken filed a petition to adopt Holly. Aiken alleged that Russell Bailey's consent to the adoption could be

waived pursuant to R.C. 3107.07(A) because Bailey had failed without justifiable cause to provide for maintenance and support of Holly as required by decree for a period of at least one year preceding the filing of the petition.

The adoption petition was heard in two phases: First, concerning whether Bailey's consent to the adoption was required, and second, whether Holly's best interests would be served by the adoption.

At the first hearing it was established that Appellant Bailey had failed to make the required court ordered support payments from June, 1986, through March, 1988, which included the one year period preceding Aiken's adoption petition. Bailey testified that Jill Aiken had excused him from making those support payments. Bailey further testified that he and his family had supported Holly through gifts and purchases of clothes. Jill Aiken denied excusing Bailey from child support payments, but did acknowledge receiving several articles of clothing and gifts from Bailey and his family.

After hearing the foregoing evidence the court held that Bailey's consent was not required. Bailey then moved for findings of fact and conclusions of law. He also moved to schedule the second hearing to consider the best interests of the child. The motion was granted and a hearing on that issue took place on April 24, 1990.

At the "best interests" hearing Timothy and Jill Aiken testified concerning their relationship with Holly and her adjustment since their marriage. Testimony was also presented by Teresa Drazak and Sandra Harrison, employees of Holly's child care facility. Appellant Bailey testified concerning his relationship with Holly before and after the petition for adoption was filed. Raymond and Sylvia Bailey, Holly's paternal grandparents testified on Appellant's behalf. Holly also testified.

Appellant again requested findings of fact and conclusions of law concerning the consent hearing and the best interests hearing.

The trial court filed a Decision and Entry on August 24, 1990,

finding that Holly's adoption by Timothy Aiken was in her best interests. The petition was granted.

Russell Bailey appealed from the order of adoption. He alleged inter alia, that the trial court erred in failing to make proper findings of fact and conclusions of law. We agreed, and on June 24, 1991, we remanded to the Probate Court for that purpose.

The Probate Court filed its findings and conclusions on October 21, 1991. Both parties have filed supplemental briefs in respect to them. We may now proceed to address all assignments of error.

Bailey's first and second assignments of error state:

THE TRIAL COURT ERRED IN THAT ITS FINDINGS OF LAW WERE INADEQUATE. THE TRIAL COURT FAILED TO STATE THE ELEMENTS OF PROOF NECESSARY TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE ADOPTION IS IN THE BEST INTERESTS OF THE CHILD.

THE TRIAL COURT ERRED IN THAT ITS FINDINGS OF FACT WERE INADEQUATE. THE FINDINGS, PARTICULARLY, THOSE TO THE EFFECT THAT RUSSELL L. BAILEY HAD FAILED TO SUPPORT HIS DAUGHTER AS REQUIRED BY LAW OR JUDICIAL DECREE AND THAT THE FAILURE WAS WITHOUT JUSTIFIABLE CAUSE, WERE CONCLUSORY ONLY AND CONTAINED NO EXPLANATION OF THE UNDERLYING CONSIDERATIONS THAT LED TO THE CONCLUSIONS.

Both assignments of error challenge the sufficiency of the findings and conclusions of the Probate Court filed on October 21, 1991. Our prior order of June 24, 1991, in effect, sustained these two assignments and remanded the case to the probate court to make proper findings and conclusions. The Probate Court has since filed findings and conclusions. Appellant Bailey's first and second assignments of error are moot and are overruled.

Bailey's third assignment of error states:

THE TRIAL COURT ERRED IN FINDING THAT THE ADOPTION WAS IN THE BEST INTEREST OF THE CHILD. THIS FINDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In a civil action an appellate court may not find a judgment to be against the manifest weight of the evidence if the trial court's decision is supported by some competent, credible evidence. C.E. Morris, Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77. A reviewing court should be guided by a presumption that the findings of the trial court are correct, since the trial court "... is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony". Seasons Coal Co., supra, at 80.

R.C. 3107.14(C) provides:

If at the conclusion of the hearing the court finds * * * that the adoption is in the best interests of the person sought to be adopted, it may issue, * * * a final decree of adoption * * *.

The Supreme Court of Ohio has held that adoption matters should be decided on a case by case basis "... through the able exercise of discretion by the trial court giving due discretion to all known factors in determining what is in the best interests of the person to be adopted." In Re Adoption of Charles B (1990), 50 Ohio St.3d 88, 90. "Thus, R.C. 3107.14(C) preserves the right of a trial court to grant or deny a petition for adoption based upon the evidence germane to each case." Id.

Evidence produced at trial established that Bailey had a history of acts of physical violence committed against Holly and her mother. On one occasion, Bailey kicked Holly in the groin, causing her to bleed. Other instances of physical violence toward Jill Aiken were detailed in the testimony. The testimony supports the conclusion that Bailey's pattern of physical violence continues.

Sandra Harrison, Holly's preschool teacher testified that immediately before and after visitation with Bailey, Holly's behavior and the quality of her school work tended to deteriorate. Holly's own testimony showed that she disliked visiting with Bailey. The testimony of Timothy Aiken shows a relationship which appears to be stable and loving.

Our review of the record demonstrates that the finding of Probate Court that Holly's best interest would be served by her adoption is supported by competent, credible evidence.

Bailey's third assignment of error is overruled. Bailey's fourth assignment of error states:

THE TRIAL COURT ERRED IN OVERRULING RUSSELL L. BAILEY'S MOTION FOR A NEW TRIAL.

The trial court entered its judgment in this matter on August 24, 1990. On August 29, 1990, Bailey filed a motion for a new trial, which was overruled.

A motion for a new trial is determined pursuant to Civ.R. 59. The trial court is required to examine the evidence and weigh the credibility of the witnesses. Rhode v. Farmer (1970), 23 Ohio St.2d 82. A motion for a new trial is addressed to the sound discretion of the trial court. Berry v. Roy (1961), 172 Ohio St. 422. In reviewing a trial court's exercise in discretion, we may reverse only for an abuse of that discretion. Rhode v. Farmer, supra. An abuse of discretion implies that the trial court brought to the determination an attitude which is unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217. In reviewing a factual determination of a lower court we are guided by the presumption that the findings of the trier of fact were correct. Seasons Coal Co., supra.

Bailey's only contention under this assignment of error is that the trial court failed to write a "reasoned decision" in denying his motion for a new trial. We have reviewed Appellant's motion for a

new trial and the trial court's decision. We see no abuse of discretion, and overrule the assignment of error.

Bailey's fifth assignment of error states:

THE TRIAL COURT ERRED IN THE COMPILATION OF THE COURT INVESTIGATION REQUIRED BY R.C. 3107.12.

Bailey complains that in preparing the report required by R.C. 3107.12 the investigator did not speak with him or his family about the proposed adoption, did not inspect their home, and did not witness the interaction between Holly and the Bailey family.

R.C. 3107.12 requires an investigation "into the conditions and antecedents of a minor child sought to be adopted and of the petitioner." In respect to the biological parents, the report of the investigator must provide names and identifying data, state their attitude toward the proposed adoption, and record their social and medical histories. The statute further prescribes, at (D)(3):

The social and medical histories may be obtained through interviews with the biological parents or other persons, and from any available records if a parent or any legal guardian of a parent consents to the release of information contained in a record. If the investigator considers it necessary, it may request that a parent undergo a medical examination. In obtaining social and medical histories of a biological parent, an investigator shall inform the biological parent, or a person other than a biological parent who provides information pursuant to this section, of the purpose and use of the histories and of his right to correct or expand the histories at any time.

The statute further allows a biological parent who provides information to the investigator to cause the histories to be corrected or expanded.

R.C. 3107.12 does not prescribe a methodology to be used by the investigator, who is not required to take the steps concerned in Bailey's argument. The information to be gained in them may be

encompassed in the child's "social history", but the statute permits its collection from the biological parents or any other persons and from any available records. The statute does not require the steps concerned in Bailey's argument. Furthermore, Bailey had ample opportunity at hearing to address the matters in his argument and present evidence concerning them, and he did so. We see no prejudice.

The fifth assignment of error is overruled.

Bailey's sixth assignment of error states:

THE TRIAL COURT ERRED IN PROCEEDING TO HOLD HEARINGS WITHOUT PROOF OF SERVICE ON THE DEPARTMENT OF HUMAN SERVICES HAVING BEEN FILED PURSUANT TO R.C. 3107.11(B).

R.C. 3107.11(A) specifies the persons and agencies upon whom a copy of the petition to adopt must be served. Subsection (1) identifies the department of human services as one of these. Subparagraph (B) provides that notice shall be given according to the Civil Rules and that "Proof of the giving of notice shall be filed with the court before the petition is heard."

The trial court's files do not contain proof that a copy of the petition was served on the department of human services prior to hearing. However, neither does the record indicate that Russell Bailey made a timely objection to that failure. Therefore, he has waived the error absent a showing of substantial prejudice that constitutes plain error.

The purpose of the requirement of service on the department of human services is to permit that agency to perform the functions required of it by law in adoption cases. In this case that was satisfied by the investigation and report made and filed with the court pursuant to R.C. 3107.12. Bailey had full notice and opportunity to be heard concerning it. We see no prejudice.

The sixth assignment of error is overruled.

Bailey's seventh assignment of error states:

THE TRIAL COURT ERRED IN FAILING TO FIND THAT RUSSELL L. BAILEY HAD JUSTIFIABLE CAUSE FOR FAILING TO MAKE HIS SUPPORT PAYMENTS. THE COURT'S FAILURE TO SO FIND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND RESTS ON AN INADEQUATE ANALYSIS OF THE STANDARD OF PROOF, THE BURDEN OF PROOF, THE BURDEN OF GOING FORWARD WITH THE EVIDENCE, AND THE INTERRELATIONSHIPS BETWEEN THE STANDARD AND BURDENS.

A natural parent's consent to adopt his minor child which is required by R.C. 3107.06(B), is not required when that parent has failed without justifiable cause to provide for maintenance and support of the minor child as required by law or judicial decree for a period of at least one year immediately preceding the filing of an adoption petition. See, R.C. 3107.07(A). This constructive "waiver" provision must be construed strictly in favor of a natural parent who otherwise withholds express consent, as Russell Bailey has done in this case. In Re Schoeppner (1976), 46 Ohio St.2d 21. Thus, failure to support without justifiable cause must be shown by clear and convincing evidence. A finding against the natural parent on the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. In Re Adoption of Masa (1987), 23 Ohio St.3d 163. In Re Adoption of Bovett (2987), 33 Ohio St.3d 102.

Russell Bailey had been ordered in the decree dissolving his marriage to Jill to pay support for Holly in the amount of $35 per week through the Bureau of Support of the Court of Common Pleas of Clark County. Bailey admits that he paid no support through that agency from June 4, 1986 through March 18, 1988. The petition to adopt was filed February 10, 1988. The one-year non-support requirement of R.C. 3107.07(A) is clearly met.

In determining whether the natural parent's failure to support was "without justifiable cause", the court must weigh the evidence of

his circumstances. In Re Bovett, supra. The burden of proof remains on the petitioner, who must show lack of justifiable cause by clear and convincing evidence. However, the natural parent may not simply stand mute so as to resist the petitioner's attempt to meet his burden. Rather, once his failure to support is proved, the natural parent has the burden to go forward with the evidence to show some facially justifiable cause for his failure. Id.

Russell Bailey showed that in the year concerned his income was but $12,000 while his expenses were $13,000. It was also shown, however, that during this period his spouse contributed $4,000 to meet their joint needs. While she had no obligation to support Holly or to satisfy her husband's duties in that respect, the court could consider the spouse's additional income resources in weighing Russell Bailey's circumstances. That additional income was available to meet their joint needs and could free some part of Russell Bailey's income for application to his child support obligation. Russell Bailey's failure to do so weighs against a finding of "justifiable cause". Indeed, the level of his income, while low by current standards, might yet permit some effort to pay some part of Bailey's court-ordered support obligation. While he was free to set his own priorities for payment of his debts, Bailey's complete failure to apply any part of his income to meet any of his child support obligation also weighs against a finding of justification.

We may not disturb the finding of the trial court unless it is against the manifest weight of the evidence. A judgment supported by some competent, credible evidence which demonstrates clearly and convincingly that the failure to support was without justifiable cause is not against the manifest weight of the evidence. That is the case here.

The seventh assignment of error will be overruled.

Bailey's eighth assignment of error states:

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN FINDING THAT RUSSELL L. BAILEY HAD FAILED TO

SUPPORT HIS DAUGHTER AS REQUIRED BY LAW OR JUDICIAL DECREE. THE TRIAL COURT FAILED TO CONSIDER THE COURT ORDERED VISITATION AS A FORM OF SUPPORT REQUIRED BY THE JUDICIAL DECREE AND GAVE INADEQUATE CONSIDERATION TO THE OTHER FORMS OF SUPPORT PROVIDED BY RUSSELL L. BAILEY.

The "other forms of support" claimed by Bailey consist of gifts and clothes furnished to Holly by Bailey and his family. By the terms of his decree of dissolution Bailey was obligated to provide monetary support for Holly at the rate of $35 per week. It is undisputed that Bailey failed to do so during the one year period preceding the petition. This obligation was a specific financial obligation and cannot be satisfied through gifts. See generally In Re Adoption of Labo (1988), 47 Ohio App.3d 57; In Re Adoption of Strawser (1987), 36 Ohio App.3d 232.

Bailey's argument that the trial court should have considered court ordered visitation as a "form of support" is likewise without merit. Bailey's consent was dispensed with for his "failure to support" not for his failure to communicate, an alternative basis to dispense with consent pursuant to R.C. 3107.07(A).

The eighth assignment of error is overruled.

Bailey's ninth assignment of error states:

THE TRIAL COURT FAILED TO DO AN INDEPENDENT ANALYSIS OF THE EVIDENCE AND USE INDEPENDENT JUDGMENT IN MAKING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED OCTOBER 21, 1991.

The trial court adopted the findings of fact and conclusions of law proposed by Aiken. Bailey claims the court erred in so doing. We disagree.

When presented with a motion for findings of fact and conclusions of law a trial court may require the parties to submit proposed findings of fact and conclusions of law. Civ.R. 52. The court

cannot transfer its responsibility for making findings and conclusions onto the parties; however, the court may adopt as its own the findings and conclusions submitted by them. See Roberts v. Ross (1965), 344 F.2d 747, 752. However, the findings and conclusions of a party, adopted by a court, will be given less weight on review and will be reviewed more closely than if they are the work product of the trial court. Id.

We have closely reviewed the findings and conclusions made by the trial court in this case. Appellant Bailey's financial situation was adequately considered by the court. Bailey was not excused from making child support payments for Holly, as he argued. While Bailey's financial status was not one of affluence, it was established in the record that Bailey had resources at his disposal by which some attempt to satisfy his child support obligation could have been made, at least for one of the twelve months prior to the adoption petition. The findings and conclusions are supported by the record. The ninth assignment of error is overruled.

CONCLUSION

The judgment of the trial court will be affirmed.

FAIN, P.J., and WILSON, J., concur.

Ohio App. 2 Dist.,1992. Matter of Adoption of Aiken

DEA

(Cite as: 1994 WL 102390 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In re: ADOPTION OF MATTHEW RYAN DEA. No. 92-L-120.

Court of Appeals of Ohio, Eleventh District, Lake County. March 25, 1994.

CHARACTER OF PROCEEDINGS:Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 3-49

Patrick R. Hanrahan, Mentor, OH Neil MYERS, Euclid, OH

NADER, J., CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment.

CHRISTLEY, P.J.

This appeal has been brought from two judgments of the Probate Division of the Lake County Court of Common Pleas. In the first judgment, the trial court overruled the objections of appellant, Thomas Dea, and adopted the report of a court referee. In the second, the court held that the consent of the natural father, appellee Robert Olgiate, was required before Matthew Ryan Olgiate could be adopted by appellant. [FN1]

FN1. There is some discrepancy between the trial court filings and the appellate filings as to the surname of the child. It is irrelevant to our determination here.

Matthew was born during the course of appellee's marriage to Debra, the natural mother. In October 1986, appellee and Debra were granted a divorce. As part of the divorce decree, Debra was given permanent custody of Matthew, and appellee was granted certain visitation privileges. In addition, appellee was ordered to pay child support to Debra in the sum of $500 per month. This amount was subsequently modified.

Following their divorce, both appellee and Debra entered into second marriages. Debra married appellant and had a second child. Over the following years, Matthew continued to live with Debra and appellant at their home in Eastlake, Ohio. Over the same period, appellee continued to exercise his visitation privileges, which allowed him to take custody of Matthew every other week-

end.

Until March 1989, appellee was employed as an engineer with General Electric in Cincinnati, Ohio. At that time, appellee was granted a six-month sabbatical from this job. During this period, appellee completed a course in aviation at a pilot training school. At the conclusion of the six months, the sabbatical was continued for three additional months. At the end of this period, appellee learned that his position with General Electric was no longer "available."

After searching for a new job for approximately six months, appellee obtained employment with an engineering firm in July 1990. This new position was terminated after approximately two months. Upon losing this job, appellee remained unemployed from September 1990 until June 1991, when he joined the Air Force Reserves as a pilot. However, due to delays in obtaining his basic training, appellee did not receive his first paycheck until December 1991.

During the period in which he was unemployed, appellee took two trips on behalf of a non-profit organization. While he was on these trips, appellee received a per diem stipend from the organization, covering his daily expenses. He did not receive any other type of compensation from the organization. Moreover, other than the per diem stipend, appellee did not have any other source of income in this period, and basically lived on the income of his second wife.

While appellee had been attending the pilot school, Debra had agreed that he would not be liable for child support. However, the agreement did not apply to the second period in which he was unemployed. Despite this, appellee did not pay any child support from September 1990 to December 1991. Yet, he continued to exercise his visitation privileges.

After appellee had failed to pay support for approximately one year, appellant filed a petition to adopt Matthew. A hearing upon this motion was held before a court referee. Based upon the evidence presented, the referee concluded that appellee's consent

was necessary before the petition could be granted. This conclusion was based upon the referee's finding that appellee had paid for some maintenance of Matthew during the period of his unemployment, even though he had not paid the child support. The referee further found that appellee's failure to pay the support had been justifiable because he had not received any income, welfare, or unemployment compensation during the period.

In objecting to the referee's report, appellant essentially challenged both of the referee's main findings. As was noted above, the trial court overruled appellant's objections and entered judgment in accordance with the referee's recommendations.

In appealing from the two judgments, appellant has assigned the following as error:

"1. The trial court erred in finding that if one were to find that the natural father failed to support the minor, the petitioner had not established by clear and convincing evidence that the natural father's failure to support his minor child was without justifiable cause pursuant to O.R.C. 3107.07, and ordering that the consent of the natural father is necessary for the adoption of Matthew Ryan Olgiate.

"2. The trial court erred in finding that the natural father did provide for the support and maintenance of the minor child and ordering that the consent of the natural father is necessary for the adoption of Matthew Ryan Olgiate."

As was noted above, the referee's ultimate conclusion, that appellee's consent to the adoption was necessary before appellant's petition could be granted, was based upon two findings of fact: (1) that appellee had provided some maintenance for Matthew during the period in which he was unemployed; and (2) that appellee's failure to pay the required child support had been justified under the circumstances of this case. Under his two assignments, appellant essentially submits that these factual findings were against the manifest weight of the evidence.

R.C. Chapter 3107 governs adoptions. R.C. 3107.06 provides that

a petition to adopt a minor child can only be granted if certain individuals execute a written consent. One of these individuals is the father of the child, if the father was married to the mother when the child was born or conceived. The next section, R.C. 3107.07, states that the consent of an individual will not be required if:

"(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

In interpreting this exception to the consent requirement, this court has held that the statute must be strictly construed in favor of the rights of the natural parent. In re Adoption of Hale (July 22, 1988), Lake App. No. 12-238, unreported. This court has further held that subsection (A) imposes a two-part responsibility upon the parent: (1) to provide maintenance and support; and (2) to communicate with the child. In re Adoption of Rantamaki (Mar. 30, 1990), Ashtabula App. No. 88-A-1422, unreported.

If the natural parent's compliance with either of these requirements is placed at issue, the petitioner has the burden of establishing by clear and convincing evidence that noncompliance with either prong has occurred. In re Adoption of Bovett (1987), 33 Ohio St.3d 102. As to the failure to provide maintenance and support, once the petitioner has demonstrated that noncompliance for the required one-year period has indeed occurred, the natural parent has the burden of going forward with some evidence showing a justifiable cause for failing to pay; however, after the natural parent has satisfied this burden, the burden of proof reverts back to the petitioner to show that the failure to pay was not justified. Bovett; In re Adoption of Dues (1990), 69 Ohio App.3d 498. Finally, the Supreme Court of Ohio has expressly held that a decision as to whether a parent's consent is required will only be reversed upon appeal when it is against the manifest weight of the

evidence. In re Adoption of Masa (1986), 23 Ohio St.3d 163.

In order to satisfy the support and maintenance prong of R.C. 3107.07(A), the petitioner cannot merely show that the natural parent has not provided support to the extent which would normally be expected; instead, the petitioner must demonstrate that the parent has provided no support during the last year. The courts of this state have consistently held that a "meager" amount of support is sufficient to avoid a finding that the parent's consent is not required. See In re Adoption of Salisbury (1982), 5 Ohio App.3d 65; Vecchi v. Thomas (1990), 67 Ohio App.3d 688.

In applying the foregoing general proposition, at least two appellate districts have held that when the natural parent has provided for the child's needs during periods in which the child has been visiting, the parent has given sufficient support to avoid the application to the exception in R.C. 3707.07(A). For example, in In re Adoption of Huffman (Aug. 29, 1986), Mercer App. No. 10-85-4, unreported, the parent failed to pay any of his support obligations. Nonetheless, the Third Appellate District held that his consent was still required because he had provided room and board and food during the periods in which the child had visited him. See, also, In re Adoption of Pinkava (Jan. 13, 1989), Lucas App. L-88-034, unreported.

We are unimpressed with these holdings because it is implicit that in exercising visitation, food and shelter will be provided. Clearly, the legislature viewed visitation and support as two distinct factors and did not mean to merge them. We find the issue of insurance and clothing to be a more convincing indicia of support, however meager.

Even if no support had been found, the referee and court nevertheless found that appellee's failure to pay his support obligation was justified under the facts of this case. In relation to this issue, appellee presented substantial evidence indicating that he was not purposely unemployed. Appellee also presented evidence indicating that he had made a substantial effort to find a job in both the engineering and aviation fields. Courts addressing the issue of

justifiable cause have held that evidence such as this was sufficient to satisfy the burden of going forward with the evidence as to this point. See, e.g., In re Adoption of Kessler (Apr. 23, 1993), Huron App. No. H-92- 23, unreported.

In attempting to show that the failure to pay was not justifiable, appellant introduced judgments from the Domestic Relations Division of the Lake County Court of Common Pleas. In these judgments, the domestic court held that appellee was still required to make support payments, even though he was still unemployed. Appellant argued that this evidence conclusively showed that the failure to pay had not been justified. In addition, appellant presented evidence indicating that appellee had been able to stay current on all of his other debts.

As to the issue of whether the judgments of the domestic relations court were binding upon the trial court, this court would note that the evidence concerning appellee's other debts indicates that appellee had access and control over some funds, but had simply decided to make his support obligation his last priority. As a moral issue, there appears to be little to justify appellee's actions.

Unfortunately, the legislature has created a significant distinction between the duty to provide support in general and to provide support under R.C. 3107.07. In reference to the former, the courts have viewed the issue very strictly because of the statutory language, and in the latter, the courts have viewed the issue quite liberally for the same reason.

In this instance, despite the irresponsible behavior of the appellee in terms of providing meaningful support, undisputed evidence was presented indicating that during the one-year period in question, appellee was still exercising his visitation privileges. Despite the contradiction of appellee's failure to make his son's well-being a financial priority, nevertheless there was apparently a genuine and longstanding relationship between the father and child which justified the liberal posture of the trial court in this matter.

As there was some competent, credible evidence to support the

trial court's finding of "some support," of visitation, and of justification for failure to pay, both assignments of error are without merit and the judgment of the trial court is affirmed.

CHRISTLEY, P.J. NADER, J., CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment, concur.

Ohio App. 11 Dist.,1994. Adoption of Dea

DERVENIS

(Cite as: 1995 WL 765213 (Ohio App. 10 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In the Matter of the Adoption of Brittny Marie and Bryan Daniel DERVENIS. Danny L. FERGUSON et al., Appellants. No. 95APF07-869

Court of Appeals of Ohio, Tenth District, Franklin County. Dec. 28, 1995.

APPEALS from the Franklin County Court of Common Pleas, Probate Division.

David A. Barth, for appellee Michael G. Dervenis. Todd G. Finneran, for appellant Danny L. Ferguson.

Kerns & Kerns, and Ralph A. Kerns, for appellants Otis and Emma Ferguson.

TYACK, J.

On February 3, 1994, Michael G. Dervenis filed a petition in the Probate Court of Franklin County seeking to adopt his two stepchildren. By way of background, the children's biological parents,

Marjorie Anne (Ferguson) Dervenis and Danny Lee Ferguson, were married at the time the children were born and were divorced in 1989. Ms. Dervenis received custody of the children and, on September 25, 1993, she married Michael Dervenis. Ms. Dervenis has consented to the adoption. In his petition, Mr. Dervenis alleged that Mr. Ferguson's consent to the adoption was unnecessary because without just cause Mr. Ferguson had failed to support the children for the year prior to the filing of the petition.

Mr. Ferguson was served with notice of the filing of the petition on February 7, 1994. Pursuant to R.C. 3107.12, an investigation was made of Mr. Dervenis and the adoptive home, and a report thereof was filed with the court. On September 26, 1994, the children's paternal grandparents, Otis and Emma Ferguson, filed objections to the petition for adoption. On that same date, a hearing was held before a general referee on both the issue of Mr. Ferguson's consent and the best interests of the children. The grandparents were heard as parties only during the best interests portion of the hearing. Mr. Ferguson did not appear or otherwise contest the issues at that time.

On October 25, 1994, the general referee submitted his report, concluding that Mr. Ferguson's consent was unnecessary and recommending that the adoption by Mr. Dervenis proceed. On November 4, 1994, the grandparents filed objections. On November 14, 1994, Mr. Ferguson entered his first appearance, asking the court for an extension of time to file objections to the referee's report. On November 24, 1994, he filed his objections.

A hearing on the objections was held on January 24, 1995; however, no testimony was taken and no transcript is in the record. On June 13, 1995, the trial court rendered its decision and entry, adopting the referee's report. Otis and Emma Ferguson (hereinafter "grandparents") have timely appealed, assigning two errors for our consideration:

"I. THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE PATERNAL GRANDPARENTS WERE NOT PARTIES AND THAT THEY LOST THEIR POST ADOPTION

VISITATION RIGHTS WHEN THEY HAD SPECIFICALLY ACQUIRED VISITATION RIGHTS THROUGH THE COURT ORDER FROM THE DOMESTIC RELATIONS COURT WHO [sic] HAD TAKEN ORIGINAL JURISDICTION ON THIS ISSUE.

"II. THE COURT'S DECISION TO TERMINATE THE GRANDPARENTAL VISITATION RIGHTS THROUGH THIS STEP-PARENT ADOPTION PROCEEDING IS NOT ONLY CONTRARY TO LAW, BUT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHICH SUPPORTS THAT IT IS IN THE BEST INTERESTS OF THE CHILDREN TO MAINTAIN A RELATIONSHIP WITH THE PATERNAL GRANDPARENTS."

Mr. Ferguson (hereinafter "appellant") has also appealed, asserting eight errors:

"I. THE COURT ERRED AS A MATTER OF LAW IN FAILING TO EITHER DENY THE REFEREE'S RECOMMENDATION OR REMAND THE CASE FOR FURTHER HEARING WHERE NEITHER THE REFEREE NOR THE COURT MADE A FINDING OF FACT THAT THE PETITIONER HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAD NO JUSTIFIABLE CAUSE FOR HIS FAILURE TO SUPPORT AND WHERE THE RECORD ON THE ISSUE OF JUSTIFIABLE CAUSE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE PETITIONER'S CLEAR AND CONVINCING BURDEN.

"II. THE FINDING BY THE COURT THAT THE DEFENDANT LACKED JUSTIFIABLE CAUSE FOR HIS FAILURE TO SUPPORT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"III. THE COURT ERRED AS A MATTER OF LAW IN APPROVING THE REFEREE'S REPORT WHICH WAS RENDERED IN VIOLATION OF SECTION 2317.39 AND IN HOLDING THAT RESPONDENT WAS 'IN NO WAY PREJUDICED

BY THE REFEREE'S USE OF THE INVESTIGATOR'S REPORT' WHERE RESPONDENT WAS DENIED THE OPPORTUNITY TO REVIEW THE REPORT.

"IV. THE COURT ERRED AS A MATTER OF LAW IN APPROVING THE REFEREE'S REPORT BECAUSE THE REPORT WAS NOT SUFFICIENT UNDER CIV.R. 53(E)(5) FOR THE COURT TO MAKE AN INDEPENDENT ANALYSIS OF THE ISSUE OF LACK OF JUSTIFIABLE CAUSE.

"V. WHERE THE COMPLAINT FAILED TO ALLEGE RESPONDENT'S FAILURE TO COMMUNICATE WITH HIS CHILDREN[,] THE COURT ERRED AS MATTER OF LAW IN HOLDING THAT RESPONDENT'S CONSENT WAS NOT NECESSARY UNDER O.R.C. SECTION 3107.07 BASED UPON FAILURE TO COMMUNICATE.

"VI. WHERE THE RECORD WAS VOID OF ANY EVIDENCE ON COMMUNICATION BETWEEN RESPONDENT AND HIS CHILDREN DURING THE REQUISITE ONE YEAR PERIOD SET FORTH UNDER O.R.C. SECTION 3107.07[A] THE COURT ERRED AS A MATTER OF LAW BY MISAPPLYING THE BURDEN OF PROOF AGAINST RESPONDENT, IN EFFECT, REQUIRING RESPONDENT TO PROVE THAT RESPONDENT HAD COMMUNICATED WITH HIS CHILDREN.

"VII. THE COURT ERRED AS MATTER OF LAW IN HOLDING THAT THE PATERNAL GRANDPARENTS WHO PREVIOUSLY HAD ACQUIRED COURT-ORDERED RIGHTS TO VISIT THEIR GRANDCHILDREN ARE NOT PARTIES TO THE STATUTORY CONSENT HEARING REQUIRED UNDER O.R.C. CHAPTER 3107.

"VIII. THE COURT ERRED IN FINDING BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT FAILED TO SUPPORT HIS CHILDREN FOR THE ONE YEAR PERIOD SET FORTH UNDER O.R.C. SECTION 3107.07."

We will address the grandparents' assignments of error first, along with the appellant's seventh assignment of error. After appellant and Ms. Dervenis were divorced, the Franklin County Court of Common Pleas, Division of Domestic Relations, granted the paternal grandparents visitation. They exercised these visitation rights. The grandparents and appellant argue that by virtue of the fact that the grandparents had been given court-ordered visitation, the grandparents should have been made parties to the consent hearing. As stated previously, the grandparents were only allowed to participate in the best interests portion of the hearing. In addition, the grandparents contend the probate court erred in taking away their visitation rights and that it is in the best interests of the children to continue such visitation.

The issue of grandparents' rights in the context of adoption has been addressed on several occasions by the Supreme Court of Ohio. First, as to the involvement of grandparents in adoption proceedings, the court has stated that there is no right of grandparents with visitation rights to intervene in adoption proceedings because there is no statutory basis for such; grandparents are not required to be given notice of adoption proceedings; and grandparents do not have to consent to adoptions. In re Adoption of Ridenour (1991), 61 Ohio St.3d 319, 328-329. In addition, once an adoption occurs, the pre-adoption visitation rights of grandparents are extinguished, and the probate court and domestic relations court cannot confer post-adoption visitation. See In re Martin (1994), 68 Ohio St.3d 250; Sweeney v. Sweeney (1994), 71 Ohio St.3d 169.

Applying these principles to the case at bar, the probate court did not err in excluding the grandparents from the consent hearing. In addition, notwithstanding our holding with regard to the probate court's finding that appellant's consent was unnecessary, once the probate court approved the adoption, both it and the domestic relations court had no power to continue the grandparents' prior visitation or order future visitation. Accordingly, the grandparents' assignments of error and appellant's seventh assignment of error are overruled.

Turning to appellant Danny Ferguson's arguments, appellant

asserts in his third assignment of error that the probate court erred in adopting the referee's report when the referee used an investigator's report which was not made available to appellant. R.C. 3107.12 states, in pertinent part:

"(A) An investigation shall be made by the department of human services, an agency, or other person appointed by the court into the conditions and antecedents of a minor sought to be adopted and of the petitioner, for the purpose of ascertaining whether the adoptive home is a suitable home for the minor and whether the proposed adoption is in the best interest of the minor. * * *

"(B) A written report of the investigation as described in division (C) of this section shall be filed with the court at least ten days before the petition for adoption is heard."

Such an investigation was made of Mr. Dervenis and the Dervenis household and was submitted to the court. Appellant argues he was prejudiced by the report when he was not permitted to review it. Appellant cites R.C. 2317.39, which states:

"Whenever an investigation into the facts of any case * * * is made * * * by any court * * * and a report of such investigation is prepared for submission to the court, the contents of such report shall not be considered by any judge of the court wherein such case is pending either before the trial of the case or at any stage of the proceedings prior to final disposition thereof, unless the full contents of such report have been made readily available and accessible to all parties to the case or their counsel. * * * "

However, R.C. 3107.17(B) pertains specifically to adoption proceedings and states:

"All papers, books, and records pertaining to a placement under section 5103.16 of the Revised Code or an adoption, whether part of the permanent record of the court or of a file in the department of human services or in an agency, are * * * subject to inspection only upon consent of the court."

Hence, appellant was permitted to review the investigator's report only upon consent of the court. Further, appellant was not prejudiced by the report as it was not relevant to the issue of consent and did not contain information regarding appellant.

Accordingly, appellant's third assignment of error is overruled.

The crux of appellant's remaining assignments of error is that the probate court erred in finding his consent to the adoption was unnecessary. R.C. 3107.06(B) provides that the father of the minor(s) to be adopted must consent to the adoption. However, R.C. 3106.07 states:

"Consent to adoption is not required of any of the following:

"(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

As discussed above, the probate court found that appellant had failed to support his children for the one year prior to the filing of the adoption petition and that he did not have justifiable cause for such failure. In his fourth assignment of error, appellant contends that the referee's report was insufficient under Civ.R. 53(E)(5) for the probate court to make an independent analysis regarding justifiable cause.

Specifically, appellant states that the referee's report did not contain a finding of fact regarding justifiable cause.

After reviewing the referee's report, we find that it was sufficient for the court to make an independent analysis. Finding of fact No. 8 indicates that appellant abandoned his family. Finding of fact No. 12 notes that appellant did not file an objection nor appear throug

counsel at the hearing. Finding of fact No. 14 indicates that appellant did not support his children during the period February 3, 1993 to February 3, 1994. Finding of fact No. 15 states that appellant was in prison. Hence, the probate court had before it the relevant evidence regarding appellant's situation, especially when supplemented with the transcript of the hearings. Accordingly, appellant's fourth assignment of error is overruled.

In his eighth assignment of error, appellant argues that the trial court erred in finding he failed to support his children. Appellant contends that because he gave his father a power of attorney and the grandparents gave the children money, appellant was supporting his children. However, the record does not reflect that appellant actually gave money to his father to give to the children. Moreover, the children did not receive support per se from their grandparents. They received gifts, and apparently the grandparents paid for the children's preschool. This does not amount to support from appellant. Accordingly, appellant's eighth assignment of error is overruled.

Appellant's assignments of error one and two are interrelated and will, therefore, be addressed together. Appellant first contends that the probate court erroneously put the burden of proving lack of justifiable cause on him, and the finding that appellant lacked justifiable cause was against the manifest weight of the evidence. In In re Adoption of Bovett (1987), 33 Ohio St.3d 102, syllabus, the court held:

"1. Pursuant to R.C. 3107.07(A), the petitioner for adoption has the burden of proving, by clear and convincing evidence, both (1) that the natural parent has failed to support the child for the requisite one-year period, and (2) that this failure was without justifiable cause. (In re Adoption of Masa [1986], 23 Ohio St.3d 163, 23 OBR 330, 492, N.E. 140, paragraph one of the syllabus, followed.)

"2. Once the petitioner has established, by clear and convincing evidence, that the natural parent has failed to support the child for at least the requisite one-year period, the burden of going forward

with the evidence shifts to the natural parent to show some facially justifiable cause for such failure. The burden of proof, however, remains with the petitioner.

"3. Under R.C. 3107.07(A), the probate court shall determine the issue of justifiable cause by weighing the evidence of the natural parent's circumstances for the statutory period for which he or she failed to provide support. The court shall determine whether the parent's failure to support the child for that period as a whole (and not just a portion thereof) was without justifiable cause.

"4. The question of whether a natural parent's failure to support his or her child has been proven by the petitioner by clear and convincing evidence to have been without justifiable cause is a determination for the probate court, and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. (In re adoption of Masa * * * [id.])." (Empashis sic.)

Appellee counters appellant's argument by pointing out that appellant did not appear at the consent and best interest hearing and, therefore, appellee only had the burden of showing failure to support. As noted above, appellee did show that appellant failed to support his children for the requisite time period.

This case presents a unique procedural situation. Although appellant did not appear at the consent hearing, some evidence on justifiable cause was still before the court.

Michael Dervenis testified at the consent hearing that a valid child support order was in effect during the entire year prior to the filing of the petition seeking the adoption. The existence of the child support order is a fact from which the probate court could infer that the domestic relations court had determined appellant was able to pay to support his children.

Ms. Dervenis also testified at the consent hearing. She indicated that she and her husband had never done anything to prevent appellant from providing support. She also was asked if she had knowledge of any reason why appellant had been unable to pay to

support his children. She responded "[n]ot that I know of," and indicated that as of the date of the hearing, she believed appellant was incarcerated.

As noted above, appellant did not appear at the hearing in person or by counsel. He also did not provide the court with any written objections to the adoption, so he presented no information which could be balanced against the affirmative indications that he had some ability to support his children. Even if the burden of going forward with information regarding the reasons for his failure to pay did not rest with appellant (which under the second paragraph of the syllabus to In re Adoption of Bovett, it clearly does), the probate referee, and subsequently the probate judge, could decide the case based only upon the evidence before the court. That evidence was construed as being clear and convincing by the trial court. We do not view that interpretation by the trial court as being outside the court's discretion.

As further noted above, appellant eventually entered an appearance through counsel, by filing a notice of appearance and a motion requesting an extension of time for filing objections to the referee's report and recommendation. The motion was filed twenty days after the referee's report was filed. Later yet, appellant's counsel filed objections to the report and recommendation and affidavits which indicated that appellant had been incarcerated from November of 1990 until January 21, 1994. The petition for adoption was filed thirteen days after his release from prison. He remained out of custody for only a brief period of time.

The probate judge never formally ruled on the motion to extend the time for filing, but considered appellant's objections in his decision and entry. The probate court never agreed to accept the affidavits as evidence in reaching its final decision.

This court has found on other occasions that the incarceration of the non-consenting father, among other facts, constitutes sufficient justifiable cause for failure to support. See In the Matter of the Adoption of Fulton (May 26, 1994), Franklin App. No. 93APF09-1330, unreported (1994 Opinions 2346). See, also, In the Matter of

the Adoption of McMillion (Dec. 31, 1991), Miami App. No. 91-CA-14, unreported. However, as noted above, the failure to support here is linked with evidence other than the fact of incarceration from which the trial court could infer an ability to pay.

As a result of the foregoing, we overrule the appellant's first and second assignments of error.

The last two assignments of error presented by appellant, numbers five and six, address issues regarding appellant's failure to communicate with his children during his incarceration. Since the trial court's finding that consent of appellant is unnecessary due to his failure to support without justifiable cause, the fifth and sixth assignments of error are moot. We, therefore, do not separately address them.

In sum, the first and second assignments of error submitted on behalf of the grandparents and the first, second, third, fourth and eighth assignments of error submitted on behalf of the appellant are overruled. The fifth and sixth assignments of error submitted on behalf of the appellant are rendered moot by our ruling on the other assignments of error.

As a result, the judgment of the probate court is affirmed.

Judgment affirmed.

YOUNG and HOLMES, [FN*] JJ., concur.

FN*. HOLMES, J., retired, of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

Ohio App. 10 Dist.,1995. In Matter of Adoption of Dervenis

FREEL

(Cite as: 1996 WL 648977 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In the Matter of: The Adoption of Allyssa L. FREEL.

No. 95-T-5303.

Court of Appeals of Ohio, Eleventh District, Trumbull County. June 14, 1996.

Civil Appeal from Court of Common Pleas, Probate Division Case No. 94 ADP 108

ATTY. JAMES D. FRANKS 106 East Market Street, # 302 Warren, OH 44481 (For Appellant) ATTY. WILLIAM R. BIVIANO 152 Elm Road, S.E. P.O. Box 790 Warren, OH 44482 (For Appellee)

Before CHRISTLEY, P.J., and MAHONEY, J., and CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment.

OPINION

CHRISTLEY, P.J.

This appeal has been taken from a final judgment in an adoption proceeding. Appellant, Samuel Spain, the biological father, seeks the reversal of the Trumbull County Probate Court's decision that his consent was not necessary in order for appellee, Rodney Freel, to adopt Allyssa L. Freel. [FN1]

FN1. The petition was filed and the action pursued in the name of both Rodney and Stephanie L. Freel, as petitioners. However, we shall refer only to Rodney Freel as appellee-petitioner.

Stephanie Freel is the natural mother of Allyssa, who was born on October 12, 1992. As of that date, Stephanie was not married to appellant or appellee. Subsequently, she married appellee who is her husband at the present time.

On February 12, 1994, a paternity hearing was held to determine whether appellant was Allyssa's natural father. At the conclusion of the proceeding, appellant signed an acknowledgment of paternity. The matter of support was continued until appellant became employed or had a source of income. At such time, he was to notify the court.

Prior to February 1994, appellant had not seen or spoken to Allyssa. He also had not contributed any funds toward Allyssa's maintenance and support. After February 1994, appellant instituted proceedings in juvenile court to obtain visitation rights with Allyssa; however, even when these proceedings resulted in a judgment in his favor, he did not communicate with the child. As to the child's maintenance, appellant did make one support payment of $23.54, at approximately the same time that he sought visitation.

In November 1994, appellee filed a petition to adopt Allyssa. Approximately three months later, appellee filed an amended petition. In conjunction with both petitions, Allyssa's natural mother, Stephanie, filed a document indicating that she consented to the adoption of Allyssa by appellee, her husband. Appellant, however, refused to give his consent.

In March and May of 1995, two evidentiary hearings were held before a probate court referee for the purpose of determining whether appellant's consent was needed before appellee's petition could be granted. Based upon the evidence presented, the referee found in her report that appellant had failed, without any justifiable cause, to provide any support for Allyssa for a period of more than one year. The referee also found that appellant had failed, without any justifiable cause, to communicate with the child for a period of more than one year. Accordingly, the referee recommended that the trial court hold that appellant's consent was not

required before the petition could be granted.

Four days after the referee had issued her report, the trial court entered a judgment in which it adopted the recommendation of the referee. Specifically, the court held that appellant's consent was not necessary. The court further stated that another hearing would subsequently be held on the issue of whether the adoption would be in Allyssa's best interest. [FN2]

FN2. Prior to June 1995, many appellate districts had held that judgments like the foregoing judgment were not final appealable orders because, since the "best interest" issue was still pending, a final determination in favor of the natural father was still possible. See In re Adoption of Cline (1993), 89 Ohio App.3d 450. However, in In re Adoption of Johnson (1995), 72 Ohio St.3d 1217, the Supreme Court of Ohio held that such a judgment is a final order because it is an order rendered in a special proceeding.

After the trial court had rendered the foregoing judgment, but before the fourteen days for objections had expired, appellant filed objections to the referee's report, essentially arguing that the referee's findings were against the manifest weight of the evidence. No transcript accompanied the objections. After appellee had filed a response to the objections, the trial court issued a second judgment in which it found appellant's objections to be without merit. The court then stated that it was "adhering" to its prior judgment.

In appealing from the trial court's two judgments, appellant has asserted three assignments of error for review:

"1. The trial court's finding that Appellant's consent to the adoption of Allyssa L. Freel is not required by law for Appellant's failure to support the minor child for one (1) year prior to the filing of the adoption petition without justifiable cause is contrary to law and against the manifest weight of the evidence amounting to an abuse of discretion by the trial court.
"2. The trial court's finding that Appellant's consent to the adoption of Allyssa L. Freel is not required by law for Appellant's

failure without justifiable cause to communicate with his daughter for a period of one (1) year preceding the filing of the petition for adoption is contrary to law and against the manifest weight of the evidence amounting to an abuse of discretion by the trial court.

"3. The petitioners to an adoption proceeding bear the burden of proof on both the issue of support or communication and the issue of no justifiable cause."

Under his first assignment, appellant seeks to challenge the referee's findings that he failed to provide maintenance and support for Allyssa for a period of more than one year. Specifically, he contends that the evidence presented during the two hearings supported the conclusion that he had a justifiable reason for failing to provide support. In support of this argument, appellant cites to the fact that no judicial order of support was pending against him during the period in question.

Prior to addressing the merits of this argument, this court would again note that, in filing his objections to the referee's report, appellant did not attach a transcript of the two hearings which were held before the referee. Although the record before us contains transcripts of both proceedings, the time stamps on those documents indicate that they were not filed until after the trial court had rendered its decision on the objections.

Prior to July 1, 1995, Civ.R. 53(E)(6) stated that if the objecting party failed to submit with his objections " * * * a copy of all relevant portions of the transcript from the referee's hearing or an affidavit about evidence submitted to the referee if no transcript is available," then the trial court could adopt the referee's findings of fact without any further consideration. In applying this rule, this court has consistently held that if an objecting party fails to satisfy this requirement, he has waived the right to contest the validity of that finding; i.e., he cannot argue before this court that the finding was against the manifest weight of the evidence. Belock v. Belock (Mar. 25, 1994), Geauga App. No. 92-G-1748, unreported, at 4. Furthermore, we have held that if the objecting party files the transcript after the trial court has rendered its decision, we cannot

review the transcript on appeal because we cannot base our decision upon evidence which was not before the trial court. Under these circumstances, this court, like the trial court, can only review the referee's findings of fact to determine whether they support the referee's legal conclusions. Belock at 5.

Accordingly, as a result of appellant's failure to follow the proper procedure at the trial level, this court cannot address the merits of his manifest weight argument; neither can we address any challenges as to specific factual findings of the referee. Instead, we can only determine whether the referee's report contained sufficient findings from which the trial court could make its conclusions.

Pursuant to R.C. 3107.06, a petition for adoption can only be granted if certain individuals have given their consent in writing. However, R.C. 3107.07 states that the petition can still be granted even if the following person does not consent:

"(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

In applying the foregoing provision, this court has indicated that:

" * * * the foregoing provision imposes a dual responsibility upon the 'non-petitioning' parent; i.e., to communicate with the minor child and to provide maintenance and support. See, e.g., In re Adoption of Rantamaki (Mar. 30, 1990), Ashtabula App. No. 88-A-1422, unreported. Moreover, the failure to satisfy either prong of the provision, without justifiable cause, ' * * * abrogates the necessity for consent.' Id. at 4." In re Adoption of Ricketts (Feb. 8, 1991), Trumbull App. No. 90-T-4408, unreported, at 4-5.

In relation to the "maintenance and support" prong, this court has

expressly held that the payment of "some" support is not sufficient to satisfy this requirement if the evidence shows that the natural father had other funds which he could have given to the child. In In re Adoption of Cline (1993), 89 Ohio App.3d 450, the natural father had made one support payment of $65 during the preceding year. This court concluded that this amount was not sufficient because other evidence showed that the natural father in Cline had paid $6,000 in attorney fees and had contributed $2,800 toward the maintenance and support of his other two children.

The panel in Cline also distinguished its holding from an earlier decision from this appellate district in which it was held that a parent's payment of $50 in support for the year was sufficient to require that parent's consent to the adoption. In re Adoption of Hale (July 22, 1988), Lake App. No. 12-238, unreported.

The Cline court found that its case differed significantly from Hale because the petitioner in Hale "apparently did not meet his initial burden of proof in demonstrating that the natural father was without justifiable cause in failing to pay child support." (Emphasis added.) Cline at 456.

Less than a year later, a different panel from this court stated:

"In order to satisfy the support and maintenance prong of R.C. 3107.07(A), the petitioner cannot merely show that the natural parent has not provided support to the extent which would normally be expected; instead, the petitioner must demonstrate that the parent has provided no support during the last year. The courts of this state have consistently held that a 'meager' amount of support is sufficient to avoid a finding that the parent's consent is not required. * * * " (Emphasis sic.) In re Adoption of Dea (Mar. 25, 1994), Lake App. No. 92-L-120, unreported, at 6-7.

However, Dea also made a specific finding that there was justifiable cause for the limited support.

In her report in the instant matter, the referee specifically found that during the year prior to the filing of the adoption petition,

appellant had only made one support payment in the amount of $23.54. [FN3] The referee also found that during the same year, appellant had earned approximately $6,000. >From this, the referee could have justifiably concluded that appellant could have made a larger contribution toward Allyssa's support, especially since there was a finding that appellant's earnings, from the time of the original paternity hearing, had doubled. The referee also found that if appellant had the discretionary income to attend school, he had sufficient income to provide more than $23.54 of support.

FN3. There is also a suggestion that this payment occurred shortly after Stephanie Freel had first approached appellant for his consent.

Notwithstanding the foregoing, appellant submits that his failure to pay was justifiable in this instance because there was no pending order requiring him to pay any support. As to this point, this court would merely note that the courts of this state have always held that a father's obligation to pay support is predicated upon both a common-law duty and a legal duty. See In re Adoption of McDermitt (1980), 63 Ohio St.2d 301. Thus, even if appellant was not under any specific statutory duty to pay support, he still had a common-law obligation to pay support to the best of his ability.

Contrary to appellant's assertions, the ruling in the original paternity action did not relieve him of his support obligation; rather, it merely postponed such obligation until his employment or receipt of income changed, which it obviously did. Appellant never notified the court that his income had more than doubled.

Following the logic of Cline, we agree that the referee's report contained sufficient facts from which the trial court could properly conclude that there was sufficient evidence presented which demonstrated that appellant had no justifiable reason for not paying more support. Thus, the trial court did not err in concluding that the "support and maintenance" prong of R.C. 3107.07 had not been satisfied.

Appellant's first assignment lacks merit.

However, even if it were subsequently determined that appellant was under no legal obligation to pay anything, or, that the $23.54 was sufficient to defeat the support and maintenance prong, appellee could still succeed if he met his burden of proof as to the "failure to communicate" issue under his second assignment.

Appellant maintains that the referee's finding on the "failure to communicate" issue was against the manifest weight of the evidence. He submits that the evidence presented during the two hearings supported the conclusion that his failure to communicate with Allyssa had been justifiable because Stephanie Freel had interfered with his right to visit the child.

Again, the failure to present a transcript with his filing of objections with the trial court prevents us from addressing the manifest weight issue. Belock at 5. Again, as in the first assignment, we are limited to an analysis of the referee's report as to sufficiency.

In relation to this prong of the standard set forth in R.C. 3107.07(A), the courts of this state have held that the failure to communicate is justifiable when the custodial parent interferes significantly with attempts by the non-custodial parent to see the child. See, e.g., In re Adoption of Hupp (1982), 9 Ohio App.3d 128. However, this court has specifically held that the mere fact that the custodial parent states that she does not want the non-custodial parent to see the child does not constitute significant interference. In re Adoption of Rantamaki (Mar. 30, 1990), Ashtabula App. No. 88-A-1422, unreported.

In her report, the referee made the following findings concerning this issue:

(1) prior to the paternity proceeding, appellant had never made any attempt to contact Allyssa; (2) following the paternity proceeding, appellant had instituted a legal action to obtain visitation rights and had his attorney contact Stephanie Freel about the matter; (3) in response to appellant's request for visitation, Stephanie Freel had indicated that she did not want appellant to see the child; (4) however, Stephanie Freel had never made any

statements indicating that a breach of the peace would occur if appellant ever attempted to visit the child; and (5) even after appellant had been awarded visitation rights through a judicial decree, he never exercised those rights.

In essence, the referee found that even though Freel had stated that she did not want appellant to see the child, such a statement did not indicate a threat. Stated differently, the referee found that appellant's statement that he was "scared" to visit the child was not supported by any other fact. Under these circumstances, the referee could legitimately conclude that interference with appellant's right to visit the child, and, that appellant's failure to communicate was due to his own choice.Since the referee's report contained sufficient facts supporting the ultimate conclusion that appellant had failed to communicate with Allyssa for a period of more than one year, appellant's second assignment is also without merit.

Under his final assignment, appellant submits that even if appellee satisfied his burden of showing appellant's failure to support or communicate with clear and convincing evidence, the evidence was such that the referee should have found that appellant set forth a justifiable reason for failing to satisfy both of these prongs.

As to this point, this court would again note that, as a result of appellant's failure to follow the correct procedure at the trial level concerning the filing of the transcript, we cannot address his manifest weight argument. Moreover, we would again emphasize that our review of the referee's report indicates that she set forth sufficient facts from which the trial court could properly conclude that appellee had satisfied his burden in proving there was no justifiable reason for appellant's failures. Accordingly, appellant's third assignment is without merit.

The judgment of the trial court is affirmed.

MAHONEY, J., and CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment, concur.

HALE

(Cite as: 1988 WL 76765 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In re ADOPTION OF Shawna Lynn HALE. No. 12-238.

Court of Appeals of Ohio, Eleventh District, Lake County. July 22, 1988.

Civil Appeal from Lake County Common Pleas Court, Case No. 2-232.

Glenn E. Forbes, Dworkin & Bernstein Co., L.P.A., Painesville, for appellant. Anthony Aveni, Cannon, Stern, Aveni & Krivok Co., L.P.A., Painsville, for appellee.

Before FORD, P.J., and COOK and CHRISTLEY, JJ.

OPINION

FORD, Presiding Judge.

Appellant Joseph Hale appeals the denial of his petition for adoption of Shawna Lynn Hale in the probate division of the Lake County Court of Common Pleas.

Patricia Eide was granted a divorce from appellee Steven Eide in the State of Washington on December 22, 1982. Mr. Eide was permitted to visit the only child of the marriage, Shawna, for one month each summer and two months each summer after the child turned five. She was born on October 15, 1979. An alternate visitation schedule was ordered if the parties lived within 250

miles of each other. Mr. Eide was ordered to pay $225 per month until the child was emancipated.

Shawna's mother then married appellant Joseph Hale in Ohio in June 1983. On December 7, 1984, appellant filed a petition for the adoption of the child in the probate division of the Lake County Court of Common Pleas, but the petition was dismissed by the trial court. Upon appeal, we affirmed. In re: Adoption of Hale (July 25, 1986), Lake App. No. 11-078, unreported. Appellant filed a second petition for the adoption of Shawna on October 6, 1986, in the same court. In July 1986, Mr. Eide, who was living in Washington, requested, pursuant to the divorce order, to visit his daughter for two months that summer. The mother refused his visitation request, claiming that the visitation, under the circumstances, was inappropriate.

In the year preceding the filing of the second petition for adoption, appellee made only one child support payment in August 1986, in the amount of fifty dollars. He claims that he stopped making child support payments because the mother would permit neither visitation nor telephonic communication between him and his daughter.

On July 8, 1987, the trial court denied the petition for adoption, prompting appellant to file a notice of appeal.

Appellant raises the following three assignments of error:

1. The trial court erred in finding that a fifty dollar payment during a one-year period for support constitutes support as required by law or judicial decree.

2. The trial court erred in finding that natural mother's actions constituted repeated interference with visitation and provided justification for a failure to support.

3. The trial court's judgment was against the manifest weight of the evidence.

Appellant asserts in his first assignment of error that the trial court

erred by finding that the appellee's single payment of fifty dollars in the year preceding the filing of the petition for adoption constituted sufficient support for the child.

R.C. 3107.07(A) states that consent to an adoption is not required of a parent when it is alleged that the parent has failed without justifiable cause to communicate with or provide maintenance and support for the minor for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in petitioner's home. Conversely, consent would be required of a parent if that parent has communicated with and provided maintenance and support for the minor during the one year period.

In order for a petition for the adoption of a child to be denied on the basis of a parent's refusal to consent to the adoption, R.C. 3107.07(A) requires that the parent against whom the petition is directed must communicate with and, if required, provide maintenance and support to the child unless he has justifiable cause for not doing so.

Appellant relies on In re: Adoption of Burton (1981), 3 Ohio App.3d 251, for his primary argument. He contends that when there is a failure to contribute the full amount of at least one ordered monthly support installment for such minor child in the twelve months preceding the filing of the petition for adoption without justification, consent by such parent is not required. Burton, supra, has since been modified by In re: Adoption of Salisbury (1982), 5 Ohio App.3d 65.

In Salisbury, supra, neither parent made any contribution to the support of their two minor children in the one year period preceding the filing of the original petition for adoption. The mother, however, made a minimal contribution after the petition was filed and before a hearing on the matter. This contribution, however, was made during the one year period preceding the filing of the amended petition.

Quoting In re: Adoption of Anthony (1982), 5 Ohio App.3d 60, 62-63, a case decided by the same court four months earlier, the

Tenth District Court of Appeals stated:
" ' * * * Under the statute which existed before enactment of R.C. 3107.07(A), the requirement was that the non-consenting parent 'properly' support and maintain the child. Former R.C. 3107.06(B)(4). While that modifier was omitted by the General Assembly in enacting R.C. 3107.07(A), there is authority for the proposition that even under the former statute there had to be a complete failure to support and maintain during the then specified two-year period immediately preceding the filing of the petition. * * *' " Salisbury at 67.

The court then went on to hold that even a meager contribution during the statutory one year period would still necessitate consent to adoption by the parent against whom the petition was directed.

To protect the rights of the natural parent, R.C. 3107.07(A) must be strictly construed. Anthony, supra, at 62. Moreover, since an adoption proceeding involves the termination of the parent-child relationship, the natural parent's rights are much more crucial than in a custody action. Salisbury at 62.

In the present appeal, appellee did not make a full month's support payment in any of the twelve months preceding the filing of the petition, but he did make a minimal payment during this one year period.

This court, in In re: Adoption of Quinn (Sept. 13, 1985), Trumbull App. No. 3509, unreported, stated that:

"When the requirements of R.C. 3107.07(A) are addressed, no burden is to be placed upon the non-consenting parent to establish that his failure was justifiable. In re[:] Adoption of Anthony (1982), 5 Ohio App.3d 60. Rather, the party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the parent has failed to support the child during the requisite one-year period and that there was no justifiable cause for the failure of support. In re[:] Adoption of Holcomb (1985), 18 Ohio St.3d 361."

Appellant has failed to meet his burden here.
Construing R.C. 3107.07(A) strictly, and in light of Salisbury, this court holds that the appellee made a support contribution sufficient in amount to require that his consent be given for the adoption of the child.

Since appellant does not assert that appellee failed to communicate with the child during the one year period, the assignment of error is without merit. Parenthetically, however, we must add that the stipulations indicate that the failure by appellee to communicate with Shawna was the result of the mother's refusal to let appellee speak with Shawna over the telephone. Had the failure to communicate been raised by appellant, it would have been justified on the state of the record before us.

Appellant asserts in his second assignment of error that the trial court erred by finding that the mother's actions provided justification for the failure to support. Read together, appellant's first and second assignments of error are somewhat inconsistent. He claims in these assignments of error that the trial court erroneously found that both the fifty dollar payment was sufficient support and that there existed justification for the failure to support. Generally, a trial court will either find that support is sufficient or that there exists a good reason for the failure to support. Such is the case in the present appeal.

The court held that the fifty dollar payment constituted adequate support, although miniscule in amount. While the court also stated that the mother repeatedly interfered with appellee's attempts to communicate with and visit his child, the trial court did not expressly find that the mother's actions provided a justification for the failure to support. The court does state, however, that the appellee should not have expected his fifty dollar payment to suffice as adequate child support. We interpret this statement to mean that the appellee's payment of fifty dollars did not actually support his daughter during the one year period. Nevertheless, for purposes of R.C. 3107.07(A), the payment was sufficient. Appellant has failed to demonstrate any error here. The second assign-

ment of error is also without merit.

Appellant lastly contends that the decision was against the manifest weight of the evidence. It is well established that a reviewing court will not disturb the finding of a lower court if there exists some competent and credible evidence to support its decision. C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279. Here appellant stipulated that the appellee was denied visitation and even oral communication with his daughter. The parties also stipulated that appellee made a fifty dollar support payment. The trial court had before it competent and credible evidence to support its decision. Therefore, we cannot reverse on this ground.

For the foregoing reasons, the decision of the trial court is affirmed.

COOK and CHRISTLEY, JJ., concur.

Ohio App.,1988. In re Adoption of Hale

JANOSKE

(Cite as: 1991 WL 244668 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In the Matter of John Paul JANOSKE, aka John Paul Pilarczyk.

David PILARCZYK, Plaintiff-Appellant, v. John Richard JANOSKE, Defendant-Appellee.

No. 90-G-1589.

Court of Appeals of Ohio, Eleventh District, Geauga County. Nov. 22, 1991.

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 90-PA-000012.

Appellant has failed to meet his burden here.
Construing R.C. 3107.07(A) strictly, and in light of Salisbury, this court holds that the appellee made a support contribution sufficient in amount to require that his consent be given for the adoption of the child.

Since appellant does not assert that appellee failed to communicate with the child during the one year period, the assignment of error is without merit. Parenthetically, however, we must add that the stipulations indicate that the failure by appellee to communicate with Shawna was the result of the mother's refusal to let appellee speak with Shawna over the telephone. Had the failure to communicate been raised by appellant, it would have been justified on the state of the record before us.

Appellant asserts in his second assignment of error that the trial court erred by finding that the mother's actions provided justification for the failure to support. Read together, appellant's first and second assignments of error are somewhat inconsistent. He claims in these assignments of error that the trial court erroneously found that both the fifty dollar payment was sufficient support and that there existed justification for the failure to support. Generally, a trial court will either find that support is sufficient or that there exists a good reason for the failure to support. Such is the case in the present appeal.

The court held that the fifty dollar payment constituted adequate support, although miniscule in amount. While the court also stated that the mother repeatedly interfered with appellee's attempts to communicate with and visit his child, the trial court did not expressly find that the mother's actions provided a justification for the failure to support. The court does state, however, that the appellee should not have expected his fifty dollar payment to suffice as adequate child support. We interpret this statement to mean that the appellee's payment of fifty dollars did not actually support his daughter during the one year period. Nevertheless, for purposes of R.C. 3107.07(A), the payment was sufficient. Appellant has failed to demonstrate any error here. The second assign-

ment of error is also without merit.

Appellant lastly contends that the decision was against the manifest weight of the evidence. It is well established that a reviewing court will not disturb the finding of a lower court if there exists some competent and credible evidence to support its decision. C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279. Here appellant stipulated that the appellee was denied visitation and even oral communication with his daughter. The parties also stipulated that appellee made a fifty dollar support payment. The trial court had before it competent and credible evidence to support its decision. Therefore, we cannot reverse on this ground.

For the foregoing reasons, the decision of the trial court is affirmed.

COOK and CHRISTLEY, JJ., concur.

Ohio App.,1988. In re Adoption of Hale

JANOSKE

(Cite as: 1991 WL 244668 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In the Matter of John Paul JANOSKE, aka John Paul Pilarczyk.

David PILARCZYK, Plaintiff-Appellant, v. John Richard JANOSKE, Defendant-Appellee.

No. 90-G-1589.

Court of Appeals of Ohio, Eleventh District, Geauga County. Nov. 22, 1991.

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 90-PA-000012.

Forrest W. Burt, Chardon, for plaintiff-appellant. James K. Farrell, Jr., Painesville, for defendant-appellee.

Before FORD, P.J., and CHRISTLEY, J., and RANDALL L. BASINGER, J., Putnam County Court of Common Pleas, sitting by assignment.

OPINION

FORD, Presiding Judge.

On January 9, 1990, appellant, David Pilarczyk, filed a petition in the probate court seeking to adopt John Paul Janoske, who is appellant's wife's child of a former marriage.

The natural father of the child, John Richard Janoske, appellee, objected to the adoption.

On April 12, 1990, the court held a hearing on the petition to adopt. The court determined that appellee failed without justifiable cause to provide for the maintenance and support of the minor as required by law for a period of at least one year preceding the filing of the adoption petitions. The court held the appellee's consent was therefore not required.

However, the court held that based on the evidence presented and an independent investigation pursuant to R.C. 3107.12, the adoption would not be in the child's best interest, and denied the petition.

Appellant appeals raising the following assignment of error:

"The trial court erred in failing to find that the adoption of John Paul Janoske by appellant was in the child's best interests."

In appellant's sole assignment of error he argues that the probate court erred in failing to find that the adoption was in the child's best interest. In In re Adoption of Jordan (Feb. 25, 1991), Preble

App. No. CA90-08-016, unreported, the court noted that: "R.C. 3107.14(C) states that at the conclusion of the hearing on a petition for adoption, if the trial court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted, it may issue a final or interlocutory decree of adoption. Thus an adoption proceeding is a two-step process involving a 'consent' phase and a 'best interest' phase. Even if a court determines that a parent's consent is not required, it must still make a separate determination that the adoption is in the child's best interest. In re Adoption of Jorgensen (1986), 33 Ohio App.3d 207, 209; In the Matter of the Adoption of: Prows (March 5, 1990), Butler App. No. CA88-09-132, unreported at 6- 7." In re Adoption of Jordan, supra, at 9.

In the instant case, the probate court determined that appellee's consent was not required, since he had failed to provide for support of the minor child for a period of at least one year preceding the filing of the petition for adoption. The court's determination on this issue has not been contested by appellee and, therefore, need not be addressed.

However, once parental consent is excused pursuant to R.C. 3107.07, the probate court is authorized to grant the adoption if it is in the best interest of the person to be adopted. In re Adoption of Jorgensen, supra, at paragraph two of the syllabus.

"[A] trial court, when deciding whether to grant or deny a petition for adoption, must consider all relevant factors before determining what is in the child's best interest. Since the facts in each case will vary, and the advisability of permitting an adoption must be made on a case by case basis, the trial court must be allowed broad discretion in making the determination." In re Adoption of Charles B. (1990), 50 Ohio St.3d 88, 94.

Courts have "recognized that the standard for determining each adoption case under R.C. 3107.14 is the child's best interest, the same standard which applies for custody determinations under R.C. 3109.04. * * * " Glover v. Glover (June 11, 1990), Brown App. No. 89-09-015, unreported. See, also, In re: Smith (December

7, 1981), Hocking App. No. 350, unreported, in which the court stated that:

"At the outset, we note that the determination as to whether adoption is in the best interest of the person to be adopted is a matter resting with the sound discretion of the trial court. * * *

"With respect to custody disputes, R.C. 3109.04(C) provides as follows:

" 'In determining the best interest of a child pursuant to this section, whether on an original award of custody or modification of custody, the court shall consider all relevant factors, including:

"(1) The wishes of the child's parents regarding his custody; (2) the wishes of the child regarding his custody if he is eleven years of age or older; (3) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interests; (4) The child's adjustment to his home, school, and community; (5) The mental and physical health of all persons involved in the situation.'

"In similar respects, in determining whether adoption is in the best interest of the person to be adopted, all relevant factors must be considered."

Therefore, the question before this court is whether, in light of all of the relevant factors, the trial court abused its discretion.

"The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." State v. Adams (1980), 62 Ohio St.2d 151, 157-58, 16 O.O.3d 169, 173, 404 N.E.2d 144, 149. See, also, Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.

In the case sub judice, it appears that the probate court abused its discretion by unreasonably determining the issue of best interests on the basis of the record before it.

The record reveals that the court, as required under R.C. 3107.12,

ordered the department of human services to conduct an investigation and prepare a report.

As noted in In re Adoption of Labo (1988), 47 Ohio App.3d 57,

"[a]lthough the primary responsibility in relation to whether an adoption should be allowed is bestowed under the law on the probate judge, great weight should be accorded to the report and investigation made pursuant to R.C. 3107.12." Id. at paragraph two of the syllabus.

In the instant case, the investigative report was filed in which the caseworker strongly recommended that the court approve the petition to adopt because of the interests, attitudes, and relationships of the family members as well as appellant's ability to provide financial and educational benefits.

Moreover, the evidence in the record showed that the minor has lived with appellant seven out of ten years of the child's life, and that they have a loving father-son relationship. Also, the child recognizes, respects, and loves appellant as a father, and wants to be appellant's son. Appellant was characterized as a proficient businessman who provided financial and economic benefits for the child.

In addition, the record discloses that the child has previously, and does presently, enjoy and maintain good relationships with his paternal grandparents and cousins. Further, both appellant and the child's mother testified that the relationship would not be severed upon adoption by appellant. Also, it was revealed that the present visitations were permitted and encouraged without a court order.

On the other hand, the record manifests that appellee had previously been convicted and incarcerated for trafficking in drugs. Further, he had been arrested for driving while under the influence and was incarcerated on two occasions. There was also testimony adduced which revealed that appellee's marital life was unstable, and that on at least one occasion he permitted guests to smoke marijuana in his home while his son was visiting. Additionally, appellee admitted to having undergone in-patient treatment for his

alcohol problem.

In spite of the foregoing, the report, the child's wishes, and the existing encouraged relationship with the paternal side of the family, the probate court determined that it was not in the child's best interest to permit the adoption. The court held that the extended family ties with the paternal side of the family were a great part of the child's life, and if lost, would be traumatic.

Since there was no evidence that appellant and/or his wife were going to sever those relationships, the court's determination was unfounded in the record, and could only have been the product of conjecture. Under the facts and circumstances of this case, such concerns can be protected and asserted prospectively by the paternal grandparents in the appropriate trial court. Welsh v. Laffey (1984), 16 Ohio App.3d 110; Graziano v. Davis (1976), 50 Ohio App.2d 83. In Laffey and Davis, supra, the courts considered the following issue:

"Does an adoption of a child by a stepparent terminate the power of the court to determine visitation rights of grandparents or relatives under R.C. 3109.11, where but for the adoption, the court finds such visitation to be in the best interests of the children?" Laffey, supra, at 112-13.

Both courts answered the foregoing question in the negative, and concluded that "such issues should be handled on a case by case basis, with the trial court retaining jurisdiction to grant visitation, whenever the best interests of the child would be served." Id. at 113. In Laffey, supra, the court stated that "[t]he probate and domestic divisions of common pleas court can act independently, but the mere fact that a probate division has granted adoption should not preclude the domestic relations division from granting visitation under the somewhat unusual facts of this case." Id.

Further, Laffey and Davis, supra, were cited with implied approval in In re Adoption of Ridenour (1991), 61 Ohio St.3d 319, as examples of when a grandparent visitation order would be appropriate in a step-parent adoption as opposed to a stranger adoption.

Id. at 327, fn. 6.

Accordingly, based on the entire state of the record and the evidence presented, the best interests of the child would have been served by permitting the petition for adoption. It was therefore an abuse of the trial court's discretion to conclude otherwise.

For the foregoing reasons, the judgment of the trial court is reversed.

CHRISTLEY, J., concurs.

BASINGER, J., sitting by assignment, dissents.

Ohio App. 11 Dist.,1991. Matter of Janoske

RANTAMAKI

(Cite as: 1990 WL 36564 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In the Matter of the ADOPTION OF Nicholas Patrick RANTAMAKI.

James RANTAMAKI, Plaintiff-Appellee. v. Robert D. LONG, Defendant-Appellant.

No. 88-A-1422.

Court of Appeals of Ohio, Eleventh District, Ashtabula County. March 30, 1990.

Civil Appeal from Ashtabula County Court of Common Pleas Probate Division, Case No. 88-69.

Gary L. Pasqualone, Curry & Pasqualone, Geneva, for plaintiff-appellee. Debra S. McMillan, Ashtabula County Legal Aid Corp., Ashtabula, for defendant- appellant.

Before MAHONEY, P.J., and FORD, J., and RANDALL L. BASINGER, J., Putnam County Court of Common Pleas, sitting by assignment for JUDITH A. CHRISTLEY, J.

OPINION

FORD, Judge.

On July 6, 1983, Nicholas Patrick Rantamaki was born out of wedlock to Suzan L. Wilson, n.k.a. Suzan Rantamaki. She filed a paternity action alleging that appellant, Robert Long, was the father. A hearing was held, and based upon appellant's admission of paternity, the court adjudged him to be the father, and "order[ed appellant to "pay Statutory Order of Support," on July 11, 1984.

On November 4, 1984, a petition was filed to change the child's last name from Long to Wilson. Even though appellant received notice of the petition and hearing, he did not object nor did he appear at the hearing.

On December 8, 1987, appellant filed a motion to establish visitation with the minor child. The hearing was scheduled to be held on January 14, 1988, but was postponed at the request of Suzan until February 11, 1988.

Appellee, James Rantamaki, who had married Suzan in May of 1987, filed a petition for adoption on January 27, 1988. In the petition, appellee alleged that appellant had "failed without justifiable cause to communicate with the minor child or to provide for the maintenance and support of the minor for over a one year period immediately preceding the filing of this petition."

On February 11, 1988, the visitation hearing was held. On the entry, the referee ordered "visitation to be set up by the attys. and Mr. Pasqualone [her attorney] to order support and work sheet. Retroactive." (Emphasis in original.) This was signed by the referee and by the trial judge. Suzan filed an objection to the report of February 17, 1988. The court on April 8, 1988, noted that the

objections to the report would not be heard until the pending adoption action was resolved.

On August 11, 1988, a hearing was had to determine, pursuant to R.C. 3107.07, if appellant's written consent was required prior to the adoption. The court concluded appellant had failed to communicate and provide support, that he had forfeited his parental rights, and that his consent was not necessary for the adoption of the child.

Appellant timely appealed raising the following assignments of error:

"1. The trial court erred to the prejudice of appellant in its order vitiating parental right of consent to an adoption.

"2. The trial court's finding that there was no justifiable cause for appellant's failure to communicate is against the manifest weight of the evidence."

Both assignments essentially raise the same issue. Further, resolution of both involves analysis of R.C. 3107.07. As such, they will be addressed in a consolidated fashion.

R.C. 3107.07 provides in part:

"Consent to adoption is not required of any of the following:

"(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

As interpreted by the courts, this language imposes a two fold responsibility upon the "non-petitioning" parent. This court in In

re: Adoption of Shawna Lynn Hale (July 22, 1988), Lake App. No. 12-238, unreported, held "consent would be required of a parent if that parent has communicated with and provided maintenance and support for the minor during the one year period." Hale, supra, at 3-4. (Emphasis in original.) As such, the parent must provide, if required, maintenance and support, and must communicate with the child unless he has justifiable cause for not doing so. Id. Failure to do either abrogates the necessity for consent.

At the consent hearing, the petitioner bears the onus of proving by clear and convincing evidence that the parent has failed to communicate with or provide support for the child. In re Adoption of Bovett (1987), 33 Ohio St. 3d 102. The ultimate determination as to whether the parent's consent is required lies obviously with the probate court based on the evidence before it. Absent a showing that the decision is against the manifest weight of the evidence, an appellate court cannot reverse. In re Adoption of Masa (1986), 23 Ohio St. 3d 163.

In this cause, the record is replete with evidence which shows appellant failed to communicate with the child for more than the statutorily imposed one year time frame. Appellant testified at the February 1988 hearing that he had only seen the child twice since 1983. Appellant also admitted at trial that the last time was in July or August of 1986 or December of 1985 or December of 1986. Because of these admissions, the burden shifted to him to show justifiable cause for this failure to communicate with the child. Bovett, supra.

Appellant here argues that the child's mother precluded him from seeing Nicholas. To the contrary, Mrs. Rantamaki testified that even though she did not want appellant to see the child, she did nothing to prohibit him from doing so. The evidence also shows appellant did not attempt to see the youngster, nor did he send gifts or cards. From this evidential table it is difficult to find that the lower court abused its discretion in finding that appellant failed to communicate and that he did not have justifiable cause for so doing.

Appellant's failure to communicate is sufficient to invalidate his

parental right of consent to the adoption. However, our analysis does not end at this juncture. We also find appellant didn't contribute any support for the minor child in the year preceding the adoption petition which also provides an independent basis to vitiate the necessity of obtaining his consent.

Appellant posits a myriad of "legal reasons" for his failure to provide support. His view or characterizations of the facts pertaining to his fundamental obligation of support, while appearing to advance his contentions, when surveyed with greater scrutiny, are tantamount to a less than comprehensive analysis of the evidence adduced at trial.

Appellant maintains that he was not obligated to pay support because no dollar figure was specified in the trial court's order. Further, he asserts that each time he requested the Child Support Bureau to set a definite amount, it did not act. Appellant also argues that he, in effect, "made year end payment of child support with his federal income tax refund monies" which were attached by the Ashtabula County Department of Human Services. Each of these explanations are fatuous.

First, it should be noted that appellant is incorrect in assuming that he does not owe support because none was ordered. Contrary to his assertion, the court did order that support was to be paid pursuant to statutory guidelines. Independently, given his admission of fatherhood, appellant was under a moral and legal obligation to help financially with his progeny. Even though the court did not specify an exact dollar figure, appellant was to present himself to the support bureau for an evaluation for support purposes. However, every time appellant was at the bureau for a support computation, he was unemployed, thus precluding such analysis. He failed to appear at the bureau when he was gainfully employed. Such convenient absences, which effectively prohibited the bureau from establishing a support guideline, do not provide an excuse for nonpayment of any support.

Appellant's "tax argument" is likewise misguided. As noted, the Ashtabula County Department of Human Services attached

appellant's tax refund checks. This was to pay for prior obligations relating to welfare payments. Independently, these monies did not go to the support bureau, nor did appellant receive credit for them or make these payments voluntarily. Finally, appellant made no other monetary contribution of any kind to or for the child. From this, the trial court properly concluded appellant has failed without justifiable cause to support the child.

For the foregoing reasons, the judgment of the trial court is affirmed.

MAHONEY, J., and BASINGER, J., sitting by assignment, concur.

Ohio App., 1990. Matter of Adoption of Rantamaki

QUINN V. HELMAN

(Cite as: 1985 WL 9949 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

IN THE MATTER OF THE ADOPTION OF ERIN MARIE QUINN

TIMOTHY M. QUINN, Adopting Father, Petitioner-Appellant v. ROBERT R. HELMAN, Natural Father, Respondent Appellee

CASE NO. 3509.

Court of Appeals of Ohio, Eleventh District, Trumbull County. September 13, 1985.

Civil Appeal from Trumbull County Common Pleas Court Case No. 84 ADP 048.

Affirmed.

ATTY. ROBERT W. JONES CO., L.P.A., 1213 East Market Street,

Warren, Ohio 44483, (for Petitioner-Appellant). ATTY. MICHAEL D. ROSSI, GUARNIERI & SECREST, 151 East Market Street, P.O. Box 4270, Warren, Ohio 44481, (for Respondent-Appellee).

OPINION

Before HON. ALFRED E. DAHLING, P.J., HON. DONALD R. FORD, J., HON. ROBERT E. COOK, J.

FORD, J.,

Petitioner-appellant, Timothy M. Quinn, appeals the judgment of the Trumbull County Common Pleas Court, Probate Division, denying his petition to adopt his stepdaughter, Erin Marie Helman.

Appellant's wife, Debra D. Quinn, was divorced from respondent-appellee, Robert R. Helman, on April 11, 1978. Pursuant to the divorce decree, Debra received permanent custody of Erin and appellee was ordered to pay $85.00 a month for child support. Following the divorce, appellee moved to California where he presently resides. On July 15, 1981, appellant and Debra were married.

On April 9, 1984, appellant filed a petition seeking to adopt his stepdaughter, Erin. The petition alleged that appellee had failed, without justifiable cause, to provide for the maintenance and support of his child for at least one year prior to the filing of the petition. A hearing was held, on September 13, 1984, to determine whether appellee had forfeited his right to consent to the adoption by failing to provide for Erin's support. After hearing the evidence, the court concluded that while appellee had failed to support his minor daughter, he had justifiable cause for this failure. The court then dismissed the adoption petition, for lack of jurisdiction.

The findings of the Probate Court that the natural father had justifiable cause not to support the child within the meaning of the statutory provisions outlining the requirement of consent for adoption was not consistent with the evidence.
Appellant argues that the evidence submitted at the hearing did not

establish that appellee had justifiable cause in failing to support his minor daughter. The assignment is not well taken.

R.C. 3107.07(A) provides as follows:

"Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

When the requirements of R.C. 3107.07(A) are addressed, no burden is to be placed upon the non-consenting parent to establish that his failure was justifiable. In re Adoption of Anthony (1982), 5 Ohio App. 3d 60. Rather, the party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the parent has failed to support the child during the requisite one-year period and that there was no justifiable cause for the failure of support. In re Adoption of Holcomb (1985), 18 Ohio St. 3d 361.

At the hearing, appellee testified that he had earned $1,500 during the one year prior to the filing of the adoption petition. He further testified that although he had sought regular employment, having sent out 75 - 100 resumes, he had been unsuccessful in his efforts. Appellee also introduced as exhibits, four employment rejections sent to him by various companies, between May 1983 and February 1984. Under Adoption of Holcomb, supra, the issues of non-support and lack of justifiable cause are questions of fact for the probate court. Further, the probate court's determination should not be overturned unless it is unsupported by clear and convincing evidence. Adoption of Holcomb, supra. Since the evidence presented in the instant case clearly supports the trial court's judgment, that appellee's failure to support his child was justified, it must be affirmed.

Appellant has understandably voiced objections to the fact that the

majority of evidence on appellee's efforts to gain employment was based on the declarations of appellee, and that there was no real evidence to verify that appellee actually made the efforts to which he testified. Likewise, appellant expresses considerable doubt as to the inability of the appellee to obtain employment, since appellee holds both a bachelor and master's degree. The appellant also contends that there is an "unconscionable burden" placed on him because it would be extremely difficult or impossible for appellant to investigate and subpoena records from California to sustain his position. Although we recognize appellant's frustration, this court is not free to disturb existing case law and/or statutory requirements. Interrogatories and depositions remain as less desirable methods, but also less expensive alternatives in the quest of unjustifiable cause evidence when great distances are involved between the minor child and a non custodial parent.

Since the effect of R.C. 3107.07 is to terminate the statutory right of a parent to withhold his consent to the adoption of his/her child, the statute must be strictly construed to protect the rights of the natural parent. Adoption of Anthony, supra. Although appellant's brief asserts that appellee's failure to communicate with Erin for the requisite period also negates the requirement of appellee's consent, that issue is not properly before this court. Since a failure to communicate was not alleged in the adoption petition, nor considered at the hearing, it cannot be raised or reviewed on appeal. Kalish v. TWA, Inc. (1977), 50 Ohio St. 2d 73.

The judgment of the trial court is affirmed.

DAHLING, P.J., COOK, J., concur

Ohio App., 1985.

IN THE MATTER OF THE ADOPTION OF ERIN MARIE QUINN TIMOTHY M. QUINN, Adopting Father, Petitioner-Appellant v. ROBERT R. HELMAN, Natural Father, Respondent Appellee

(CONSTITUTIONAL PROVISIONS, STATUTES, AND RE-STATEMENTS OF THE LAW INVOLVED IN THE CASE:)

(CONSTITUTIONAL PROVISIONS:)

Amendment I, United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

Amendment IX, United States Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV, Section 1, United States Constitution: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Section 2, United States Constitution: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ... to Controversies to between two or more States; —between a State and citizens of another State; — between Citizens of different States ..."

Article IV, Section 1, United States Constitution: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article VI, United States Constitution: "...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in

the Constitution or Laws of any State to the Contrary notwithstanding..."

(UNITED STATES STATUTORY PROVISIONS:)

28 United States Code Section 1331 Federal question: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States;

28 United States Code Section 1441 Actions removable generally: "(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. ... (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. ... (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates. ..."

28 United States Code Section 1446 Procedure for removal: "... (b) ... if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through serviceor otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action ..."

28 United States Code Section 1738A(a) Full faith and credit given to child custody determinations: "The appropriate authorities of every State shall enforce according to its terms, and shall not

modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State."

28 United States Code Section 1738B(a) General Rule: "The appropriate authorities of each State — (1) shall enforce according to its terms a child support order made consistently with this section by a court of another State;..."

28 United States Code Section 1738B(b) Definitions: "...'child support' means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child..."

28 United States Code Section 1738B(f)(1) Recognition of child support orders: "If only one court has issued a child support order, the order of that court must be recognized."

28 United States Code Section 1738B(h)(2) Choice of law (former 28 United States Code Section 1738B(g)(2)): "(2) Law of State of Issuance of Order. —In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order."

(STATE OF OHIO STATUTORY PROVISIONS:)

Ohio Revised Code 2317.39 Report of investigations conducted by court made available to all parties: "Whenever an investigation into the facts of any case, civil or criminal, pending at the time of such investigation in any court, is made, conducted, or participated in, directly or indirectly, by any court or any department thereof, through public employees, paid private investigators, social workers, friends of the court, or any other persons, and a report of such investigation is prepared for submission to the court, the contents of the such report shall not be considered by any judge of the court wherein the case is pending either before the trial of the

case or at any stage of the proceedings prior to final disposition thereof, unless the full contents of such report have been made readily available and accessible to all parties to the case or their counsel. The parties or their counsel shall be notified in writing of the fact that an investigation has been made, that a report has been submitted, and that the contents of the report are available for examination. Such notice shall be given at least five days prior to the time the contents of any report are to be considered by any judge of the court wherein the case is pending. In the event that a report following such investigation is prepared for submission orally, such oral report shall be reduced to writing prior to issuance of notice of the availability of such report for examination. This section does not apply only to the utilization of the contents of such reports as testimony, but shall prevent any judge from familiarizing himself with such contents in any manner unless this section has been fully complied with."

Ohio Revised Code 3107.031 Home study (former Ohio Revised Code 3107.12): "An assessor shall conduct a home study for the purpose of ascertaining whether a person seeking to adopt a minor is suitable to adopt. A written report of the home study shall be filed with the court at least ten days before the petition for adoption is heard. The report shall contain the opinion of the assessor as to whether the person who is the subject of the report is suitable to adopt a minor and other information and documents specified in the rules adopted by the department of human services under section 3107.032 of the Revised Code. The assessor shall not consider the person's age when determining whether the person is suitable to adopt if the person is old enough to adopt as provided by section 3107.03 of the Revised Code. An assessor may request departments or agencies within or outside this state to assist in the home study as may be appropriate and to make a written report to be included with and attached to the report to the court. ... On request, the assessor shall provide the person seeking to adopt a copy of the report of the home study. The assessor shall delete from that copy any provisions concerning the opinion of other persons, excluding the assessor, of the person's suitability to adopt a minor."

Ohio Revised Code 3107.06 Consents required: "Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:

(A) The mother of the minor;

(B) The father of the minor, if any of the following apply:

(1) The minor was conceived or born while the father was married to the mother ...

(F) The minor, if more than twelve years of age, unless the court, finding that it is in the best interest of the minor, determines that the minor's consent is not required."

Ohio Revised Code 3107.07 Consents not required: "Consent to adoption is not required of any of the following: (A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner. ...

(D) A parent whose parental rights have been terminated by order of a juvenile court under Chapter 2151. of the Revised Code.

(E) A parent who is married to the petitioner and supports the adoption. ..."

Ohio Revised Code 3107.08 Execution of consent: "(A) The required consent to adoption may be executed at any time after seventy-two hours after the birth of a minor, and shall be executed in the following manner:

(1) If by the person to be adopted, in the presence of the court ..."

Ohio Revised Code 3107.082 Assessor's meeting with parent prior to parent's consenting to adoption: "Not less than seventy-two hours prior to the date a parent executes consent to the adoption of the parent's child under section 3107.081 of the Revised Code, an assessor shall meet in person with the parent and do both of the following unless the child is to be adopted by a stepparent or the parent resides in another state:

(A) Provide the parent with a copy of the written materials about adoption prepared by the department of human services under division (C) of section 3107.083 of the Revised Code, discuss with the parent the adoption process and ramifications of a parent consenting to a child's adoption, and provide the parent the opportunity to review the materials and to ask questions about the materials, discussion, and related matters. ..."

Ohio Revised Code 3107.09 Social and medical histories of biological parents: "(A) The department of human services shall prescribe and supply forms for the taking of social and medical histories of the biological parents of a minor available for adoption.

(B) An assessor shall record the social and medical histories of the biological parents of a minor available for adoption, unless the minor is to be adopted by the minor's stepparent or grandparent. The assessor shall use the forms prescribed pursuant to division (A) of this section. The assessor shall not include on the forms identifying information about the biological parents or other ancestors of the minor.

(C) A social history shall describe and identify the age; ethnic, racial, religious, marital, and physical characteristics; and educational, cultural, talent, and hobby, and work experience background of the biological parents of the minor. A medical history shall identify major diseases, malformations, allergies, ear or eye defects, major conditions, and major health problems of the biological parents that are or may by congenital or familial. These histories may include other social and medical information relative to the biological parents and shall include social and medical

information relative to the minor's other ancestors. The social and medical histories may be obtained through interviews with the biological parents or other persons and from any available records if a biological parent or any legal guardian of a biological parent consents to the release of information contained in a record. An assessor who considers it necessary may request that a biological parent undergo a medical examination. In obtaining social and medical histories of a biological parent, an assessor shall inform the biological parent, or a person other than a biological parent who provides information pusuant to this section, of the purpose and use of the histories and of the biological parent's or other person's right to correct or expand the histories at any time. ..."

Ohio Revised Code 3107.11 Hearing and notice: "(A) After the filing of a petition to adopt an adult or minor, the court shall fix a time and place for hearing the petition. The hearing may take place at any time more than thirty days after the date on which the minor is placed in the home of the petitioner. At least twenty days before the date of hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the court to all of the following ... (3) A person whose consent is not required as provided by division (A), (G), (H), or (I) of section 3107.07 of the Revised Code and has not consented...

(B) All notices required under this section shall be given as specified in the Rules of Civil Procedure. Proof of giving of notice shall be filed with the court before the petition is heard."

SECTON 15B

O.R.C. 3107.12 Prefinalization assessment and report: (A) Except as provided in division (B) of this section, an assessor shall conduct a prefinalization assessment of a minor and petitioner before a court issues a final decree of adoption or finalizes an interlocutory order of adoption for the minor. On completion of the assessment, the assessor shall prepare a written report of the

assessment and provide a copy of the report to the court before which the adoption petition is pending. The report of a prefinalization assessment shall include all of the following: (1) The adjustment of the minor and the petitioner to the adoptive placement;

(2) The present and anticipated needs of the minor and the petitioner, as determined by a review of the minor's medical and social history, for adoption-related services, including assistance under Title IV-E of the "Social Security Act," 94 Stat. 501 (1980), 42 U.S.C.A. 670, as amended, or section 5153.163 of the Revised Code and counseling, case management services, crisis services, diagnostic services, and therapeutic counseling.

(3) The physical, mental, and developmental condition of the minor;

(4) If known, the minor's biological family background, including identifying information about the biological or other legal parents;

(5) The reasons for the minor's placement with the petitioner, the petitioner's attitude toward the proposed adoption, and the circumstances under which the minor was placed in the home of the petitioner;

(6) The attitude of the minor toward the proposed adoption, if the minor's age makes this feasible; ...

The assessor shall file the prefinalization report with the court not later than twenty days prior to the date scheduled for the final hearing on the adoption unless the court determines there is good cause for filing the report at a later date.

(B) This section does not apply if the petitioner is the minor's stepparent, unless a court, after determining a prefinalization assessment is in the best interest of the minor, orders that an assessor conduct a prefinalization assessment. ..."

Ohio Revised Code 3107.14 Court's discretion; final decree or

interlocutory order: "(A) The petitioner and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.

(B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition, and may examine the petitioners separate and apart from each other.

(C) If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted as supported by the evidence, it may issue, subject to division (B)(1) of section 2151.86, section 3107.064, and division (E) of section 3107.09 of the Revised Code, and any other limitations specified in this chapter, a final decree of adoption or an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which, except as provided in division (B) of section 3107.13 of the Revised Code, shall not be less than six months or more than one year from the date of the issuance of the order, unless sooner vacated by the court for good cause shown. In determining whether the adoption is in the best interest of the person sought to be adopted, the court shall not consider the age of the petitioner if the petitioner is old enough to adopt as provided by section 3107.03 of the Revised Code. In an interlocutory order of adoption, the court shall provide for observation, investigation, and a further report on the adoptive home during the interlocutory period.

(D) If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person as supported by the evidence,

or if the person is a minor, the court may certify the case to the juvenile court of the county where the minor is then residing for appropriate action and disposition."

Ohio Revised Code 3107.15 Effects of final decree: "(A) A final decree of adoption and an interlocutory order of adoption that has become final as issued by a court of this state, or a decree issued by a jurisdiction outside this state as recognized pursuant to section 3107.18 of the Revised Code, shall have the following effects as to all matters within the jurisdiction or before a court of this state, whether issued before or after the effective date of this amendment:

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and the adopted person's relatives, including the adopted person's biological or other legal parents, so that the adopted person thereafter is a stranger to the adopted person's former relatives for all purposes including inheritance and interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the person by name or by some designation not based on a parent and child or blood relationship."

Ohio Revised Code 3107.16 Appeals; finality of decree: (A) Appeals from the probate court are subject to the Rules of Appellate Procedure and to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. Unless there is good cause for delay, appeals shall be heard on an expedited basis.

(B) Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor, or, in the case of

the adoption of a minor by a stepparent, the adoption would not have been granted but for fraud perpetrated by the petitioner or the petitioner's spouse, or in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period."

Ohio Revised Code 3107.161 Contested adoption; factors considered; best interest of child:

"(A) As used in this section, 'the least detrimental avaiable alternative' means the alternative that would have the least long-term negative impact on the child.

(B) When a court makes a determination in a contested adoption concerning the best interest of a child, the court shall consider all relevant factors including, but not limited to, all of the following:

(1) The least detrimental available alternative for safeguarding the child's growth and development;

(2) The age and health of the child at the time the best interest determination is made and, if applicable, at the time the child was removed from the home;

(3) The wishes of the child in any case in which the child's age and maturity makes this feasible;

(4) The duration of the separation of the child from a parent;

(5) Whether the child will be able to enter into a more stable and permanent family relationship, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements;

(6) The likelihood of safe reunification with a parent within a reasonable period of time;

(7) The importance of providing permanency, stability, and continuity of relationships for the child;

(8) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

(9) The child's adjustment to the child's current home, school, and community;

(10) The mental and physical health of all persons involved in the situation;

(11) Whether any person involved in the situation has been convicted of, pleaded guilty to, or accused of any criminal offense involving any act that resulted in a child being abused or neglected; whether the person, in a case in which a child has been adjudicated to be an abused or neglected child, has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether the person has been convicted of, pleaded guilty to, or accused of a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the person's family or household; and whether the person has been convicted of, pleaded guilty to, or accused of any offense involving a victim who at the time of the commission of the offense was a member of the person's family or household and caused physical harm to the victim in the commission of the offense.

(C) A person who contests an adoption has the burden of providing the court material evidence needed to determine what is in the best interest of the child and must establish that the child's current placement is not the least detrimental available alternative."

Ohio Revised Code 3107.17 Confidentiality; records; access to histories of biological parents; rights of parties concerning proposed correction or expansion; procedures: "(A) All hearings held under sections 3107.01 to 3107.19 of the Revised Code shall be held in closed court without the admittance of any person other than essential officers of the court, the parties, the witnesses of the parties counsel, persons who have not previously consented to an adoption but who are required to consent, and representatives of

the agencies present to perform their official duties.

(B)(1) Except as provided in divisions (B)(2) and (D) of this section and sections 3107.39 to 3107.44 and 3107.60 to 3107.68 of the Revised Code, no person or governmental entity shall knowingly reveal any information contained in a paper, book, or record pertaining to a placement under section 5103.16 of the Revised Code or to an adoption that is part of the permanent record of a court or maintained by the department of human services, and agency, or attorney without consent of a court. ..."

Ohio Revised Code 3109.03 Equal rights of parents to parental rights and responsibilities toward children: "When husband and wife are ... divorced ... they shall stand upon an equality as to the parental rights and responsibilities for the care of their children ... so far as parenthood is involved."

(RESTATEMENTS OF THE LAW:)

Restatement, Second, Conflict of Laws, Section 2, Comment b:

"... Effect of the Constitution, Treaties and Laws of the United States. Certain provisions of the United States Constitution limit the power of the States of the United States in the field of Conflict of Laws and hence are themselves part of each State's Conflict of Laws rules (see Section 3, Comment c). These provisions include:

"The Full Faith and Credit Clause. This clause (Article IV, Section 1), in conjunction with its implementing statute (28 U.S.C. Section 1738) [to include 28 U.S.C. Section 1738B], sets forth the measure of respect which each State must give to the acts, records, and judicial proceedings of a sister State.

"The Due Process Clauses. This clause (Article VI) requires the States to give effect to the Constitution, statutes and treaties of the United States and to authoritative decisions of the federal courts in areas of national law [to include 28 U.S.C. Section 1738B]. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964);

Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1961); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Garret v. Moore-McCormak Co., 317 U.S. 239 (1942).", [amplification added].

Restatement, Second, Conflict of Laws, Section 3, Reporter's Note, Comment d:

"... Under the Supremacy clause (Article VI) of the Constitution, national law, including the authoritative decisions of the federal courts, must be applied by federal and State courts alike in areas of national law [to inclue 28 U.S.C. Section 1738B]. See, e.g., State of Texas v. State of New Jersey, 379 U.S. 674 (1965); Banco Nacional de Cuba v. Sabbatino 376 U.S. 398 (1964); Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

"National law sometimes requires application of State law as the rule of decision [as in 28 U.S.C. Section 1738B(h)(2), formerly 28 U.S.C. Section 1738B(g)]. See, e.g., Federal Tort Claims Act, 28 U.S.C. Section 1346b; Yiatchos v. Yiatchos, 376 U.S. 306 (1964); United States v. Brosnan, 363 U.S. 237 (1960); DeSylva v. Ballentine, 351 U.S. 570 (1956); Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946); Blair v. Commissioner, 300 U.S. 5 (1937); United States v.Certain Property Located in the Borough of Manhattan, 306 F.3d 439 (2d Cir. 1962); Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U.L.Rev. 385 (1964).".

Restatement, Second, Conflict of Laws, Section 6, Choice-of-Law Principles (1):

"A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

Restatement, Second, Conflict of Laws, Section 7, Comments b, c, and f:

"b. Two aspects of characterization. Characterization is an

integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the legal categories and rules of law. The factual situation must be classified to determine under what legal categories and rules of law it belongs. Likewise, the terms employed in the legal categories and rules of law must be interpreted in order that the factual situation may be placed under the appropriate categories and that the rules of law may be properly applied.

"c. Differing meaning of same word. When the same legal term or concept appears in the local law of two states which are involved in a problem and different meanings are given in these states to the term or concept, the meaning to be applied is that which prevails in the state whose local law governs the issue under the applicable choice-of-law rule.

"f. Whether a question of characterization should be determined by national or State law depends upon which of these two bodies of law governs the issue involved. So, in areas, governed by national law [i.e., Full faith and credit for child support orders], questions of characterization are determined by national law except where State law is referred to by national law as the rule of decision.", [i.e., 28 U.S.C. s 1738B(h)(2), formerly 28 U.S.C. s 1738B(g)] [amplifications added].

Restatement, Second, Conflict of Laws, Section 7, Reporter's Note, Comment e:

"... Supreme Court cases which have held that a State cannot avoid constitutional limitations on choice of law by resort to characterization include John Hancock Mutual Life Insurance Co. v. Yates, 299 U.S. 178 (1936) ("remedy"); Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934) ("place of making"); Home Insurance Co. v. Dick, 281 U.S. 397(1930) ("remedy")".

Restatement, Second, Conflict of Laws, Section 8, Reporter's

Note:

"The Supreme Court of the United States has held that under the Federal Tort Claims Act the reference is "to the whole law of the State where the act or omission occurred," including its choice-of-law rules. Richards v. United States, 369 U.S. 1 (1962)."

Restatement of the Law, Second, Conflict of Laws (1988 Revisions), Section 97 Res judicata as to jurisdiction over thing or status or as to competence over subject matter, Comments a, b, and c:

"(a) ... Subject to the qualifications stated in Comment c, a State may constitutionally hold that under the circumstances stated in the rule the parties are precluded from attacking a judgment on the ground that the court had no jurisdiction or competence ...

"(b) ... Limitations imposed by the Constitution upon the power of a State to adopt such a rule of res judicata and exceptions to the usual command of full faith and credit are discussed in Comment c ...

"(c) Constitutional limitations. ... In rare situations due process considerations may prohibit a State from applying such a rule of res judicata on the ground that it would involve an unjustifiable infringement of the interests of a sister State, or, at least, full faith and credit may not require the sister State to hold the judgment immune from collateral attack. The Supremacy Clause of the Constitution (Art. VI) will prevent application by a State of such a rule of res judicata when to do so would conflict with an important federal policy. Thus, if a federal statute provides that during the pendency of bankruptcy proceedings in a federal court the State courts shall have no jurisdiction to foreclose a mortgage on the land of a farmer, and in a proceeding for foreclosure the State court erroneously holds that it has jurisdiction and renders a decree of foreclosure, the decree is void and subject to collateral attack since the policy underlying the statute is strong enough to overcome State rules of res judicata. Kalb v. Feuerstein, 308 U.S. 433 (1940); cf. Kloeb v. Armour Co., 311 U.S. 199 (1940)."

Restatement of the Law, Second, Judgments, (1982), Section 81 Invalid Judgment, Comment a:

"... The rules of recognition of judgments of courts within this country, state or federal, derive from the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution in the case of state judgments; the Supremacy Clause; and 28 U.S.C. s 1738, which has been contrued to apply not only to state court judgments but federal court judgments as well. ... if the original action was contested,the rendering court's assumption of subject matter jurisdiction is entitled to recognition, unless as a matter of the rendering state's law the question of subject matter jurisdiction can be reexamined in a subsequent action. See Restatement, Second, Conflict of Laws s 97. As a matter of the domestic law of each state, the circumstances under which the question of subject matter jurisdiction can be reexamined in a subsequent action are very narrow. See ss 12 and 69 of this Restatement"

(PERTINENT QUOTATIONS OF SPECIFIC PORTIONS OF THE RECORD:)

March 22, 1995, Judgment Entry of the Trumbull County Probate Court in Case Nos. 94ADP057 and 94ADP058 determining that the natural father's consent to adoption is "not necessary" and applies only to the prospective adoptions being appealed:

"Therefore, it is ORDERED that the consent of the natural father is not necessary for this adoption to proceed pursuant to R.C. 3107.07(A)."

January 21, 1997, Opinions of the Eleventh District Court of Appeals of Ohio where natural father raised a federal law question in the First and Second Assignments of Error in the consent determination appeal in appellate Case Nos. 95-T-5228 and 95-T-5229, Page 5/1-10:

"Appellant filed a timely appeal and now asserts the following two assignments of error:

"1. The trial court's finding that appellant failed to provide for the maintenance and support of this minor child for a period of one-year preceding the filing of the adoption petition was against the manifest weight of the evidence.

"2. The trial court's finding that appellee proved by clear and convincing evidence that appellant failed to support his child without justifiable cause is against the manifest weight of the evidence and contrary to law."

Record of the best interest hearing on September 30, 1997, in the Trumbull County Ohio Probate Court in Case Nos. 94ADP057 and 94ADP058:

(Page 103/8-10): Natural father's testimony:

"I have previously contested the adoptions and gone through a hearing about that and a decision which took away might rights to say 'No' to this adoption. So, now here I am at this best interest hearing and this is because of an adoption regarding Jorgenson, that allowed me to be here today and to testify as to the best interest of the children, in the State of Ohio".

(Page 112/17 - 113/18): Natural father's closing arguments:

"I have come forward to this Court to testify as to the best interest of Benjamin and Emily that it's in their best interests to have a relationship with me as their natural father, and that it should not be taken away from us, even over my objections and consent issues, that's a separate issue right now, and I think it all boils down to the amount of money that was paid on child support, and then was not paid on child support in the previous court caseon my consent, where my consent was taken away from me by the law. I thank the State of Ohio for allowing me to testify to the best interest of Benjamin and Emily on this side of the fence, and I feel it's a travesty of justice. Something needed to be taken up at a later date, a later time, and a later venue, and that I still feel that, according to the law, I paid sufficient support to have my consent

required. I still assert that. I did not get to the Supreme Court. I attempted to get to the Supreme Court of Ohio, and the case was not heard yet, and I just would like to have that finally decided, that issue, for the good of all people. Not just me in my case, but for all fathers that have paid some support, but not enough, that the laws in the State of Ohio would be uniformly for each county jurisdiction decided. In Celestino v. Schneider, which Sharon Griffin did do that case, it was decided that $36.00 of child support was sufficient in that case for that father to need his consent."

(Page 114/4 -22): Natural father's closing arguments, continued:

"As far as the consent issue, in my case I paid $329.40 in child support, the twelve months prior to the filing of the adoption petition. And in both of those cases, the outcome, depending on if this adoption goes through, these outcomes will be opposite, and it just shouldn't be that way. There should be a clear cut standard in every county, and the Supreme Court of Ohio should rule on this, use somebody's case and hear it, because it is not fair for one person to keep their children and the other to lose their children over even the same amount of money. It shouldn't be a money issue, it has to be in the best interest of the children now, but it wouldn't even be here if that particular issue had been settled by the Supreme Court before now. I believe in the adoption of Bobitt in 1987. I believe that was the case. Justice Douglas mentioned this and almost begged the General Assembly of Ohio to do something about the issue. It's now been ten years since that and nothing's been done and I just wish my case could have done that."

(Page 117/6 - 118/2): Natural father's closing argument continued:

"Well, I would also like to say that I hope that somebody will realize what parental alienation is. I never knew what it was before I started this. And I do feel that is a factor which has led to this adoption. It's like the ultimate alienation anyone could do to a parent, to adopt their children away from them without their consent, and to get away with it. And I think it should not happen. I think Benjamin and Emily need to have a relationship with me, right now, while they are growing up. They may not want to, but

that's not the issue. The issue is, what is the best thing for the children.
It's not just because to have a happy life now because I have been taken
out of it. The issue is that they should know me, as their father. They know that I love them and that this has happened to me and to them, not without my fighting it as far as I could go. And I will continue to fight it if it is possible for me to fight a decision against this, only to the extent that the law allows me, but I do feel that an injustice has been served. That's all."

July 1, 1999, Opinions of the Eleventh District Court of Appeals of Ohio where the natural father raised federal questions in the Second, Third, Fourth, Fifth, and Seventh Assignments of Error on appeal of the granting of the adoption petitions in appellate Case Nos. 97-T-0223 and 97-T-0224, Page No. 8/8 - 9/34:

"From this judgment, the appellant filed a timely notice of appeal and now asserts the following nine assignments of error: ...

(2) The granting of the adoption is unconstitutional and violates the separation of church and state and the equal protection clause of the United States Constitution where the judgment entry is based on testimony that: 'both children ... already use the last name Wagner in church', 'Mr. Wagner is active ... in church activites with them', 'the family attends church together regularly', 'the children have had perfect attendance in Sunday school for the last three years', and 'the extended family extends (sic) church and gathers together every Sunday for dinner.'

(3) The granting of the adoption without 'notice of filing' and 'proof of service' of the state-initiated 'Report on Proposed Adoption'; or the 'ODHS Prefinalization Report' and without admission of said reports into evidence at the 'best interest' hearing subject to cross-examination by the appellant, is unconstitutional and violates the appellant's civil liberties as a parent and due process rights under the Fourteenth Amendment.
(4) The exclusion of appellant from the state-initiated investigation

and subsequent 'Report on Proposed Adoption' and 'ODHS Prefinalization Report' is unconstitutional and violates the appellant's liberty interest in the maintenance of the parent-child relationship and due process rights under the Fourteenth Amendment.

(5) The de facto termination of the appellant's parent-child relationship via the granting of an adoption under the 'best interest' standard without the consent of the appellant and without a prior legal termination of the appellant's parental rights is unconstitutional and a violation of the appellant's civil liberties as a parent and due process rights under the Fourteenth Amendment of the United States Constitution. ...

(7) Ohio Revised Code 3107.07(A) is unconstitutional because it is too vague and forces judges to use personal subjective values resulting in arbitrary legislation of the judiciary which violates the appellant's due process and equal protection rights under the Fourteenth Amendment.

(OTHER UNREPORTED CASES IN SUPPORT OF ARGUMENT IN PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH DISTRICT COURT OF APPEALS OF OHIO: IN THE MATTER OF THE ADOPTION OF RICHARD ASENTE INTERSTATE CONTESTED ADOPTION CASE (BETWEEN STATES OF KENTUCKY AND OHIO):)

(Cite as: 1999 WL 1073664 (Ohio App. 11 Dist.)) NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

In the Matter of the ADOPTION OF Richard ASENTE.

Court of Appeals of Ohio, Eleventh District, Trumbull County. Oct. 29, 1999.

Civil Appeal from the Court of Common Pleas, Case Nos. 98 ADP

040 and 99 ADP 023.

Michael E. Scala, Warren, OH, (For Appellant, Regina Carol Moore). Stephanie A. Dietz, Elsmere, KY, (For Appellant, Jerry Dorning). Susan G. Eisenman, Columbus, OH, and Anthony G. Rossi, Michael D. Rossi, Warren, OH, (For Appellees). Daniel B. Letson, Warren, OH, (Guardian ad litem).

CHRISTLEY, P.J., and NADER, J.

OPINION

ONEILL, J.

The following appeal concerns an interstate custody dispute. It represents a two-year multi-state legal struggle concerning a little boy and the two families who love him. By definition, contested adoption proceedings are traumatic events. There are rarely winners in the traditional sense of the word, and there is enough emotional turmoil to fill a family therapist's calendar for months on end.

The current litigation at this appellate level is not about good parents or bad parents. Further, this court is also not determining custody, an issue to be decided later by a court with competent jurisdiction. Rather, this court has a very solemn role to play, and that is to determine which court, either a Kentucky or Ohio court, has jurisdiction over this matter. As this case demonstrates, the best interest of a child is never served when adults turn to seemingly endless litigation to resolve their disputes. In this case, the parties have staked out a position and have waited for the courts to schedule hearings where it is hoped that the Wisdom of Solomon will come down on the "winning" side. In the interim, the life of a child and two families are left in turmoil and uncertainty to no one's benefit. Litigation of these matters is already difficult when one court in one state is involved in the controversy. It becomes unwieldy when multiple states become embroiled in the dispute and cannot agree on the basic issue of jurisdiction.

There are many statutes, and proposed statutes, throughout this murky area of the law designed to avoid the very situation we find ourselves in today. One common thread runs through every statute, every court opinion, and every learned treatise on this matter. That common thread is built on the bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter.

As a matter of law, one court, and one court only, may exercise jurisdiction over this child and this dispute. As is readily apparent, that basic concept of one court and one child has been violated in this matter. The present controversy began in the State of Kentucky when one set of parents decided to set the process in motion to voluntarily place their child up for adoption with another party. When the natural parents changed their minds and sought to terminate the voluntary adoption, additional proceedings were initiated in an Ohio court to effectuate the "voluntary" adoption proceeding. What began as a dispute in one court in one state ended in two courts from two separate states issuing orders regarding this matter. [FN1] Both courts claim to have jurisdiction over this dispute and both courts have issued diametrically opposing orders with respect to the child. For the reasons that follow, we determine that the Ohio court does not have jurisdiction over this matter.

FN1. Trumbull County Court of Common Pleas, Probate Division, in the State of Ohio; and the Sixteenth Judicial District, Kenton Circuit Court, Fourth Division, in the Commonwealth of Kentucky.

The following facts are pertinent to this appeal. On February 28, 1997, the child who is the subject of this dispute, Justin, was born in Boone County, Kentucky. The child's unmarried natural parents are appellants, Regina Moore (individually referred to as "Moore") and Jerry Dorning (individually referred to as "Dorning").

The Asentes, who reside in Trumbull County, Ohio, previously participated in an "open" adoption with Moore for their first child, Joseph. [FN2] The Asentes agreed to participate in a second

"open" adoption with Moore.

FN2. To avoid the possibility of confusion, we note that the adoption of Joseph by the Asentes is not the subject of this dispute.

After Justin's birth in February 1997, Moore apparently changed her mind and indicated that she would parent the child herself. Approximately eleven months later, in December of 1997, Moore again contacted the Asentes and indicated her willingness to proceed with the adoption. As part of the arrangement, the Asentes hired a Kentucky attorney, Thomas C. Donnelly, to represent Moore and Dorning with respect to the termination of their parental rights, after which the Asentes would then be able to proceed with the adoption of the child in Ohio.

Attorney Donnelly testified at a hearing before the Kentucky Court that the Asentes chose to terminate appellants' parental rights through a voluntary termination proceeding in Kentucky. He testified that this approach was chosen because it was the fastest way to assure that appellants' parental rights were terminated. It is apparent that appellants expressed reservations about proceeding with the adoption at an early stage. However, Attorney Donnelly, as well as others associated with the adoption, continued to assure appellants that they had until the "final hearing" on their petition for voluntary termination of their parental rights to change their minds.

On December 16, 1997, Moore and Dorning signed a form titled "Application for Permission to Receive or Place a Child." This form designated the Asentes as the persons who appellants wished to adopt Justin. On January 12, 1998, appellants signed an Interstate Compact Placement Request (ICPC-100A) requesting state approval for the interstate placement of Justin with the Asentes.

On January 27, 1998, Moore and Dorning signed separate documents entitled "Voluntary and Informed Consent to Adoption." These documents, prepared by Attorney Donnelly, purported to convey appellants' consent to the adoption of Justin by the Asentes. This form also contained a provision stating that the

consent was final and irrevocable twenty days after execution of the document. Despite the language in this document, purporting to extinguish appellants' parental rights without the need of judicial intervention, Attorney Donnelly continued to inform appellants that they would still be able to "change their minds" anytime prior to the voluntary termination of parental rights proceeding that was to be filed in Kentucky. Attorney Donnelly further informed appellants that these consent forms were necessary to permit the immediate and temporary placement of the child with the Asentes in Ohio.

On February 17, 1998, the Asentes signed a "Legal Risk Statement," prepared by Attorney Donnelly, indicating their understanding that Moore and Dorning could void their consent concerning the proposed adoption anytime prior to the final hearing on the termination of appellants' parental rights. That same day, both the Kentucky and Ohio Offices of Interstate Compact on the Placement of Children approved the placement of the child with the Asentes. Also on February 17, 1998, Justin was physically transported by the Asentes from Kentucky to their home in Trumbull County, Ohio where the child has continuously resided to this day.

Virginia Smith, the Administrator of Interstate adoptions in Kentucky, would later testify at a proceeding in the Kentucky court that she did not notice that the Asentes executed a Legal Risk Statement. She stated that this statement would have raised a "red flag" to her that this adoption was proceeding as a voluntary termination of appellants' parental rights which needed court approval, as opposed to an out-of-state adoption which would not require judicial intervention under Kentucky law.

Soon after Justin was placed with the Asentes, Moore and Dorning contacted Attorney Donnelly expressing their reluctance to go through with the voluntary termination of their parental rights. Attorney Donnelly again informed appellants that they had until the termination hearing to change their minds. He then gave Moore the name of someone to talk with regarding her indecision over terminating her parental rights.

On March 9, 1998, appellants signed a "Petition for Voluntary Termination," prepared by Attorney Donnelly, and filed with the Kenton Circuit Court, Case No. 98-AD-00020 on March 16, 1998. The matter was set for a final hearing on March 26, 1998.

On the date of the final hearing, March 26, 1998, appellants met Attorney Donnelly at the Kenton County Courthouse and informed him that they did not want to proceed with the adoption and that they wanted Justin returned immediately. Justin had been in Ohio for a total of thirty-seven (37) days at that time. The Kentucky court was notified that appellants did not want to proceed with the voluntary termination of their parental rights and the hearing was cancelled pending further action. Thereafter, Moore contacted the Asentes by telephone to inform them of her decision to halt the adoption and have Justin returned to her immediately. That same day, the Asentes acknowledged appellants' right to have Justin returned to them but requested that they reconsider their decision. Appellants made subsequent attempts to contact the Asentes in order to regain custody of Justin with no response. When appellants contacted Attorney Donnelly for assistance, he informed appellants that he was no longer in a position to offer them counsel in this matter. Thereafter, sometime during May of 1998, appellants retained alternative counsel and requested that the Kentucky court order the Asentes to immediately return Justin to their custody.

On June 5, 1998, the Asentes filed a petition for adoption of Justin in Ohio with the Trumbull County Court of Common Pleas, Probate Division, designated as Case No. 98 ADP 040. The petition alleged that appellants' consent to the adoption was unnecessary based on the "Voluntary and Informed Consent to Adoption" forms signed by both Moore and Dorning on January 27, 1998. The Asentes further noted that both of these forms indicated that they were "final and irrevocable" twenty days later, a time period that had long since passed since the child was first placed in their custody.

On July 6, 1998, the Kentucky Court in Case No. 98-AD-00020 issued an order asserting that it had jurisdiction over Justin as well

as any issues related to the custody and best interest of the child. On July 8, 1998, the Trumbull County Probate Court dismissed the Asentes' adoption petition on the basis that the Kentucky court currently had jurisdiction over whether appellants' parental rights were properly terminated under Kentucky law. From this judgment of the Ohio court, the Asentes filed an appeal with this court designated as Case No. 98-T-0145.

On August 21, 1998, with the initial appeal still pending in this court, the Asentes filed a motion in the Trumbull County Probate Court titled "Motion for Hearing and Reconsideration." In their motion, the Asentes alleged that the Kentucky court dismissed the action before it in Case No. 98-AD-00020 for lack of jurisdiction.

Pursuant to Civ.R. 60(B)(4), the Asentes requested relief from the Ohio court's judgment of July 8, 1998. [FN3] After filing additional motions in the Ohio trial court with respect to their motion for relief from judgment, the Asentes subsequently requested a voluntary dismissal of the appeal filed in this court in Case No. 98-T-0145. This court granted the Asentes' request for dismissal of the original appeal by judgment entry filed October 19, 1998.

FN3. Due to the important nature of the case before us, and the fact that a determination of the procedures utilized by the Asentes to have their claims heard in an Ohio court would not change the ultimate outcome of our decision, we offer no opinion as to the propriety of the Asentes filing a motion for relief from judgment in the trial court in conjunction with the filing of their notice of appeal in this court. See Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc. (1994), 70 Ohio St.3d 141, 147, 637 N.E.2d 890; Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc. (1997), 79 Ohio St.3d 98, 101-102, fn. 5, 679 N.E.2d 1084.

In November of 1998, the original probate judge who declined to exercise jurisdiction over the adoption of Justin in Ohio disqualified himself from this case. A judge from the Stark County Court of Common Pleas was assigned to preside in the Trumbull County Probate Court over this matter. On December 14, 1998, this new judge granted the Asentes' request for relief from the order of July

8, 1998, which denied jurisdiction in Ohio.

On February 11, 1999 and February 25, 1999, respectively, the Asentes filed a supplemental petition for adoption in Trumbull County in Case No. 98 ADP 0040 as well as a new petition for adoption designated as Case No. 99 ADP 023. In both the supplemental and new petitions for adoption, the Asentes asserted that appellants' consent to the adoption became unnecessary pursuant to R.C. 3107.07(A) because appellants had failed without justifiable cause to provide for the maintenance and support of the child for the one-year period immediately preceding the filing of the adoption petition. Subsequently, the new probate judge assigned to hear this matter indicated that it would hold a hearing regarding its ability to assume jurisdiction over the Asentes' adoption petitions.

While the Asentes were attempting to establish a foothold from which to have an Ohio court hear their claims for custody of Justin, proceedings were also being held in Kentucky regarding this matter. It is apparent that the Asentes made a special appearance in Kentucky Case No. 98-AD-00020 asking the court to reconsider its order of July 6, 1998, which accepted jurisdiction over all issues related to the custody of Justin. Following a hearing on August 17, 1998, the Kentucky court on September 8, 1998, ruled that the Asentes were not a proper party to the confidential proceeding regarding appellants' "Petition for Voluntary Termination" of their parental rights filed March 16, 1998. The Kentucky court further noted that this "Petition for Voluntary Termination" was dismissed.

On August 17, 1998, prior to the Kentucky court formally dismissing appellants' "Petition for Voluntary Termination," appellants filed a second action in the Kenton Circuit Court designated as Case No. 98-CI-01610. This action, filed exactly six months from the date Justin left Kentucky for Ohio, sought an order from the Kentucky court requiring the Asentes to immediately return Justin to his natural parents. On September 4, 1998, the Asentes filed a motion to dismiss this action claiming that Ohio was the proper forum for this dispute to be resolved and again claimed that they had proper custody of the child based on the "Voluntary and

Informed Consent to Adoption" that appellants signed on January 27, 1998. In an order filed October 22, 1998, the Kentucky court denied the Asentes' motion to dismiss. The Kenton Circuit Court further held that Kentucky remained Justin's home state, that there existed substantial evidence regarding the child's welfare in Kentucky, and concluded that Kentucky retained jurisdiction over this matter.

On February 4, 1999, a hearing was held in Kentucky Case No. 98-CI-01610 with all of the parties, including the Asentes, regarding appellants' petition for the immediate return of Justin to his natural parents. On February 11, 1999, the Kentucky court determined that the "Voluntary and Informed Consent to Adoption" forms signed by Moore and Dorning on January 27, 1999, were void and concluded that the child should have been returned to appellants after they dismissed their petition to voluntarily terminate their parental rights.

In its entry, the Kentucky court recounted the evidence presented at the hearing; specifically, the court noted that the parties agreed that the adoption would proceed with a voluntary termination of appellants' parental rights in Kentucky followed by the filing of an adoption petition by the Asentes in Ohio. The court further noted that Attorney Donnelly may have made a mistake in utilizing terms in the consent form that parroted language utilized in an alternative means to permit an adoption, one that did not require judicial intervention. However, the Kentucky court concluded that this mistake was insufficient to change the parties' agreement with respect to how this adoption was to proceed. Thus, the Kentucky court granted appellants' petition for the immediate return of Justin subject to a visitation and transfer plan to be approved by the court at a later date. The Asentes have filed an appeal from this order that is currently pending in the Kentucky appellate court system.

Back in Ohio, the Trumbull County Probate Court conducted a hearing on April 2, 1999, regarding its ability to assume jurisdiction over the adoption petitions filed by the Asentes. Evidence was presented at this hearing concerning the proceedings held in Kentucky as well as testimony regarding the significant connec-

tions that both the Asentes and Justin now have with the State of Ohio.

By judgment entry filed April 8, 1999, the Ohio trial court ruled that this was not a case where a conflict existed "between the concurrent subject matter jurisdiction of two courts" because only Ohio was exercising adoption jurisdiction, a valid exercise of the court's subject matter jurisdiction. The court scheduled a hearing for the Asentes' adoption petitions and further held that the order issued by the Kentucky court in Case No. 98-CI-01610 on February 11, 1999, was not entitled to full faith and credit by the courts of the State of Ohio.

In making this determination, the trial court attempted to reconcile the following three statutes that have varying degrees of applicability to adoption proceedings:

1.) the Interstate Compact on the Placement of Children ("ICPC"), codified in Ohio at R.C. 5103.20 et seq. and in Kentucky at KRS 615.030;

2.) the Uniform Child Custody Jurisdiction Act ("UCCJA"), codified in Ohio at R.C. 3109.21 through 3109.37 and enacted, in substantially the same form in Kentucky at KRS 403.420 through 403.630; and

3.) the Parental Kidnapping Protection Act ("PKPA") Section 1738A, Title 28, U.S.Code.

From this judgment, appellants filed a timely notice of appeal and now present the following five assignments of error:

"[1.] THE TRIAL COURT ERRED, TO THE DETRIMENT OF APPELLANTS, IN RULING THAT OHIO HAD JURISDICTION TO HEAR THIS CASE.

"[2.] THE TRIAL COURT ERRED, TO THE DETRIMENT OF APPELLANTS, IN FAILING TO GIVE FULL FAITH AND CREDIT TO THE ORDERS OF THE CIRCUIT COURT OF

KENTON COUNTY, KENTUCKY.

"[3.] THE TRIAL COURT ERRED, TO THE DETRIMENT OF APPELLANTS, BY HOLDING THE HEARING IN OPEN COURT.

"[4.] THE TRIAL COURT ERRED, TO THE DETRIMENT OF APPELLANTS, BY FAILING TO DISMISS THIS PETITION FOR LACK OF A NECESSARY PARTY.

"[5.] THE TRIAL COURT ERRED, TO THE DETRIMENT OF APPELLANTS, BY ENTERING ORDERS ON CUSTODY AND VISITATION WITHOUT HAVING THE JURISDICTION TO DO SO.

Before addressing appellants' assigned errors, we note that this appeal originated as four separately filed cases, resulting in appellate Case Nos. 99-T-0055 through 99-T-0058. As all four cases present identical issues, this court consolidated the individually filed appeals for all purposes. On July 15, 1999, this court expedited the briefing and hearing schedules for this case and noted that the principal issue to be resolved was the determination of which state's court, Ohio or Kentucky, has proper jurisdiction over this matter. As this is the core issue to be resolved, we will address appellants' first, second, and fifth assignments of error first and in a consolidated manner. Both parties, as well as the American Academy of Adoption Attorneys who filed an amicus brief on behalf of the Asentes, attempt to entice this court into deciding this matter by weighing the respective parenting abilities of the parties. This we decline to do as the decisive issue before this court is the right of an Ohio court to exercise jurisdiction over this matter.

A cursory review of the facts of this case reveals that at alternative times during this proceeding, both the Ohio and Kentucky courts have issued orders asserting their exclusive jurisdiction over various aspects of this matter. In the end, however, each state proclaimed that it alone had "home state" jurisdiction over the minor child and was in the best position to determine the issues

involved in this adoption proceeding.

As the Ohio trial court indicated, an analysis as to which court properly has jurisdiction over this matter requires a review of three separate statutes: the ICPC; the UCCJA; and the PKPA. However, it must be noted at the onset of our analysis that the law in this area has been hampered by the inconsistent and apparently result-driven outcomes reached by the various courts that have addressed similar issues regarding jurisdictional conflicts.

In reaching its decision to exercise jurisdiction over this matter, the trial court first considered the ICPC, a law that has been enacted by all fifty states and the District of Columbia to facilitate the cooperation between states for the placement of children. One of the ICPC's provisions, at Article V, provides as follows:

"(A) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child * * *."

In interpreting this article with respect to interstate jurisdictional disputes, an argument could be made that appellants were the "sending agent" as that term is defined in the ICPC [FN4] and that Kentucky retained jurisdiction to determine all matters regarding the care and custody of Justin until such time as the adoption in Ohio was finalized. However, various court and scholarly opinions assert that the term "jurisdiction," as utilized in the ICPC, was never intended to determine which court may appropriately exercise jurisdiction over all or some aspects of an adoption proceeding. See comment to Sec. 2-107, 9 Uniform Laws Annotated, Part I (Supp.1999) Uniform Adoption Act 19; Adoption of Zachariah K. (1992), 6 Cal.App.4th 1025, 8 Cal.Rptr.2d 423, 431.

FN4. The term "sending agency" is defined at Article II of R.C. 5103.20 as a "party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state." (Emphasis added.)

Rather, these commentators alleged that the ICPC helps to determine the legality of an interstate placement only after a court has properly asserted jurisdiction (in an adjudicatory authority sense) under the UCCJA and PKPA, and that the term "jurisdiction" as used in the ICPC merely refers to which party in an adoption proceeding has "responsibility for a child's well-being." Id; see, also, Waller, Note: When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Interstate Adoption Proceedings (1996), 33 Harv. J. on Legis. 271, 288, noting the many courts throughout this country have attached jurisdictional importance in the adjudicatory authority sense to ICPC provisions.

The Ohio trial court indicated in its entry of April 8, 1998, that despite the problematic language utilized in Article V, it also was rejecting the idea that the ICPC established a court's jurisdiction to decide adoption matters and focused its analysis instead on the UCCJA and PKPA. Upon review, we cannot fault the trial court's decision in this regard. Our search of the relevant case law has found no Ohio court that has either accepted or rejected jurisdiction of an adoption matter based on the ICPC.

However, we have found courts in Ohio that have applied the UCCJA to jurisdictional conflicts in adoption proceedings. See Roth v. Hatfield (Dec. 28, 1983), Gallia App. Nos. 82CA19, 82CA20 & 82CA21, unreported; In re Adoption of Woodruff (Dec. 31, 1984), Ross App. No. 1125, unreported; but, see, In re Adoption of White (Feb. 16, 1982), Pickaway App. No. 80-CA-25, unreported, a decision out of the same appellate district as Roth and Woodruff, holding that the UCCJA is only relevant to custody

disputes and has no application in an adoption proceeding.

The trial court's application of the UCCJA and PKPA to adoption matters, to be discussed in more detail infra, appears to have the support of the majority of jurisdictions within the United States. See, e.g., Souza v. Superior Court of Santa Cruz (Cal.App.1987), 193 Cal.App.3d 1304, 238 Cal.Rptr. 892; Gainey v. Olivo (Ga.1988), 258 Ga. 640, 373 S.E.2d 4; Foster v. Stein (Mich.App.1990), 183 Mich.App. 424, 454 N.W.2d 244. The rationale behind these courts which apply the UCCJA to adoption cases, an analysis accepted by the trial court, stems from the ultimate effect of adoption; namely, to completely terminate the custody rights of the child's natural parents. This approach, as with the application of the ICPC to determine jurisdictional conflicts, has its critics who cite problems with applying the UCCJA to adoption proceedings and note that the term "adoption" is found nowhere within the UCCJA's definition of "custody proceedings." Williams v. Knott (Tex.App.1985), 690 S.W.2d 605; In re Johnson (Ind.App.1981), 415 N.E.2d 108, 110-111; see, also, Hollinger, The Uniform Adoption Act: Reporter's Ruminations (1996), 30 Fam. L.Q. 345, 369; Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer (1996), 84 Calif.L.Rev. 703.

As with the trial court's decision not to apply Article V of the ICPC to determine the jurisdictional dispute in this matter, we again do not fault the trial court's decision to apply the UCCJA and the PKPA. Although the trial court recognized that the "thrust" of these acts was to settle "disputes between family members," the Ohio court also recognized that "adoption proceedings are truly custody proceedings requiring application of the PKPA and the UCCJA because the end result of an adoption is the complete termination of the rights of the birth parents." (See page 21 of the trial court's judgment entry).

While this court agrees with the trial court's decision to apply the UCCJA and PKPA to this dispute, we begin to part company with the Ohio court's analysis in its failure to give full faith and credit to the Kentucky court's actions with respect to this matter. In apparent contradiction of its decision to accept jurisdiction over

the minor child pursuant to the UCCJA and the PKPA, the trial court indicated that appellants' petition for the voluntary termination of their parental rights, filed in March of 1997, in a Kentucky court, "was not for the purposes of determining the custody of Justin." (See page 16 of the trial court's judgment entry). We fail to see how a termination of appellants' parental rights, either through a voluntary petition or an adoption proceeding, did not, for all purposes, determine "custody" of Justin.

From a review of the entire record of this proceeding, it is clear that the parties intended this adoption to follow a two-step process: First, the termination of appellants' parental rights was to be accomplished as quickly as possible through a voluntary termination proceeding to be filed in Kentucky; and, second, the subsequent adoption of Justin was to take place by the Asentes in Ohio. When the first step in the above process did not go as planned, the Asentes, rather than returning the child to the natural parents, attempted to obtain jurisdiction of this matter in an Ohio court under provisions of the UCCJA and PKPA.

For purposes of determining jurisdiction under the UCCJA and PKPA, dates such as when a child moved from one state to another as well as when a custody proceeding "commenced" in a particular state can be vitally important. In this case, the parties do not dispute that Justin left the state of Kentucky for the last time on February 17, 1998. There is also no dispute that the Asentes filed their initial adoption petition in Ohio on June 5, 1998.

There is some question whether the petition for voluntary termination, filed March 16, 1998, or motion for immediate entitlement on August 17, 1998, constituted the filing of the initial "custody" action in Kentucky. The Asentes present a number of arguments as to why this court should not consider the date appellants filed their "Petition for Voluntary Termination" as the date for determining the "commencement" date of the first custody proceeding to be filed in Kentucky. [FN5] Instead, the Asentes assert that the only action filed in Kentucky concerning the custody of Justin, and which included them in the proceedings, occurred on August 17, 1998. It was then appellants filed an action seeking an order from

the Kenton Circuit Court for the immediate return of Justin. Even if this court accepts this later date, August 17, 1998, as the commencement of the first true custody proceeding in Kentucky, this date was still sufficient to establish jurisdiction of this matter in Kentucky and not Ohio pursuant to the UCCJA and PKPA.

FN5. The Asentes assert that they were not parties to the voluntary termination proceeding filed in Kentucky by appellants in March of 1998. Thus, the Asentes argue that the Kentucky court did not have personal jurisdiction over them from which to require an Ohio court to give full faith and credit to any order stemming from Kentucky case No. 98-AD- 00020. We question why the Asentes would expect, under the circumstances of this case, to be present at a hearing to determine if Justin's natural parents wanted to "voluntarily" terminate their parental rights. However, it is not necessary to delve into these sets of arguments based on the manner in which we have addressed the parties' argumentation.

Pursuant to R.C. 3109.22(A), the UCCJA provides, in pertinent part, that no court in Ohio may exercise jurisdiction to make a parenting determination unless one of the following applies:

"1. This state is the home state of the child at the time of commencement of the proceeding, or this state had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a parent who claims a right to be the residential parent and legal custodian of a child or by any other person claiming his custody or is absent from this state for other reasons, and a parent or person acting as parent continues to live in this state;

"2. It is in the best interest of the child that a court of this state assumes jurisdiction because the child and his parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; * * *."

Appropriately, the primary "purpose of the UCCJA is to avoid jurisdictional competition and conflict with other jurisdictions and to facilitate the speedy and efficacious resolution of custody matters so that the child or children in question will not be caught in a judicial 'tug of war' between different jurisdictions." In re: Race Shelton (Sept. 30, 1997), Trumbull App. No. 97-T-0075, unreported, at 8, citing In re Palmer (1984), 12 Ohio St.3d 194, 196, 465 N.E.2d 1312.

When a court of this state is asked to make a custody decision with respect to a child who is the subject of proceedings within the jurisdiction of another state, the UCCJA anticipates that a meaningful dialogue will occur between the judges in deciding which court is the more appropriate forum from which to decide the child custody issues. R.C. 3109.24. The initial Ohio trial court judge deferred to the Kentucky court's decision. However, that judge later disqualified himself from the case and a new judge was appointed to this matter. Unfortunately, the new Ohio judge and the Kentucky judge could not reach an agreement. When both states claimed jurisdiction, under the first alternative of the UCCJA, the courts needed to determine which state was Justin's home state at the time the respective custody proceedings were filed by the parties.

As previously noted, a child's "home state" is the state the child resided in for a period of six consecutive months immediately preceding the commencement of a custody proceeding or the state where a child lived within six months before the commencement of a custody proceeding and the child is absent from the state because a person claims to have custody of the child in another state, and a contestant continues to reside in this state. See R.C. 3109.22(A) and R.C. 3109.21(E). Ohio can only qualify as Justin's "home state" based on the first definition of said term while Kentucky may be considered Justin's home state under the second definition as set forth above.

In the present case, Justin, nearly one-year old at the time Asentes received physical possession of the child, had resided with his natural parents for nearly his whole short life. He resided with his

prospective adoptive parents for less than four months by the time the original adoption petition was filed in Ohio. [FN6] Consequently, pursuant to R.C. 3109.21(E) and the definition of the term "home state," it was impossible for Ohio to be Justin's home state, contrary to the finding by the Ohio trial court. On the other hand, appellants filed an action in Kentucky within the six-month period and claimed that they were entitled to the return of the child to whom the Asentes were improperly claiming custody under the laws of Ohio. By filing their custody proceeding within the six-month time period after Justin left Kentucky for the last time, [FN7] appellants can claim that Kentucky has home-state jurisdiction over this matter.

FN6. We recognize that the Asentes filed a supplemental and new petition for adoption of Justin in February of 1999. However, the "commencement" of their adoption petition was June 5, 1998, and we refuse to seriously undermine the purpose of the UCCJA by considering for "home state" purposes the time period that has passed while the courts determine the proper forum to resolve this custody dispute.

FN7. As previously noted, appellants filed their initial custody action in Kentucky, at the very latest, on August 17, 1998. This is just within the six-month time period, for purposes of the calculating relevant time period for UCCJA and PKPA purposes, from the date Justin began residing in Ohio for the first time on February 17, 1998.

Turning to the second alternative, R.C. 3109.22(A)(2), there can be little disagreement that both states can properly claim that Justin has significant connections to the states of Ohio and Kentucky. However, in an effort to eliminate the possibility of two states claiming to have jurisdiction over the same child, the PKPA allows for "significant connection" jurisdiction only if no state qualifies for "home state" jurisdiction. Section 1738A(c)(2)(B), Title 28, U.S.Code; Justis v. Justis (1998), 81 Ohio St.3d 312, 317, 691 N.E.2d 264; In Re Adoption of Child by T.W.C. (1994), 270 N.J.Super. 225, 636 A.2d 1083, 1087.

In order for one state to modify a custody decree of another state under the PKPA, the following two factors must be met:

"(1) the state seeking to modify the decree must have jurisdiction to make a custody determination, and (2) the original state must no longer have jurisdiction, or must have declined to exereise jurisdiction." Id.

In the absence of an Ohio court meeting the above two factors, the child custody determinations of another state made in conformity with the UCCJA are entitled to full faith and credit in this state. Id. at 315. In this case, the Kentucky court has ruled that the consent forms that appellants signed on January 27, 1998, were not valid and this determination is entitled to full faith and credit by this court and the State of Ohio. Thus, under our application of the UCCJA and PKPA to this case, we determine that a Kentucky court is the proper forum in which to assert jurisdiction over this matter.

We recognize that the Asentes will take issue with our decision and will dispute, among other things, the Kentucky court's claim of "home state" jurisdiction. In particular, the Asentes claim that appellants' motion for immediate entitlement, time-stamped August 17, 1998, was insufficient, under Kentucky law, to commence an action concerning Kentucky's "home state" jurisdiction when Justin left Kentucky for the last time on February 17, 1998. However, this is a controversy for the Kentucky court system to resolve, not this court. The Kentucky court's decision to exercise "home state jurisdiction," appearing regular on its face, is not subject to collateral attack in Ohio. See Souza, 193 Cal.App.3d at 1311, 238 Cal.Rptr. 892. Should the Kentucky court agree with the Asentes' appeal, they will be able to file a subsequent adoption petition for Justin in Ohio. Until that date, however, an Ohio court has no jurisdiction.

As previously noted, several commentators, see p. 18, infra, have criticized the application of the UCCJA and PKPA to adoption disputes and this criticism has some basis when viewed against the present factual scenario. These commentators have proposed a new

act, the Uniform Adoption Act, designed to resolve some of the problems associated with this case as well as other problems associated with adoptions. See 9 Uniform Laws Annotated, Part I (Supp.1999) Uniform Adoption Act 19; Hollinger, The Uniform Adoption Act: Reporter's Ruminations (1996), 30 Fam. L.Q. 345, 369; Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer (1996), 84 Calif.L.Rev. 703.

Under the current system, when an adoption goes through as planned a beneficial situation occurs amongst the natural parents, the adoptive parents, the child, and the state. However, when things go wrong in an adoption proceeding, this case demonstrates the time, expense, and heartache that result. This court is certainly in favor of any changes to the current statutory scheme that will provide for the swift and certain resolution of disputes that occur in this area.

Although these commentators have counseled against applying the UCCJA and PKPA to this dispute, the analysis they would apply to this proceeding, based on the current state of the law, would not have changed the outcome of our decision. In an interstate adoption that is contested, these commentators suggest that it would have been appropriate for the Ohio court to either stay or dismiss the adoption proceeding before it in order for the birth parent's state to determine the validity of the consent or the attempted revocation of consent. In the alternative, these commentators suggest that the Ohio court could have invoked choice of law rules that would have applied the law of the birth parent's state to resolve the disputed issues. Hollinger, at 370-371, fn. 78; Kay, at 730-731, fn. 111.

The Ohio trial court did not adopt either of these suggestions and chose to proceed with jurisdiction over the Asentes' adoption petitions without any inquiry into the validity of the consents executed by appellants. It is too late for the trial court to rectify this error as the Kentucky court has already rendered a decision regarding the validity of appellants' consent in a proceeding in which the Asentes fully participated in and, following an adverse decision, filed an appeal within the Kentucky court system.

Even under this alternative view, the Kentucky court judgment is entitled to full faith and credit in Ohio and is valid until such time as the Kentucky court determines that it no longer has jurisdiction or determines that the appellants' consent to this adoption is no longer necessary. See Litsinger Sign Co. v. American Sign Co. (1967), 11 Ohio St.2d 1, 227 N.E.2d 609, paragraph one of the syllabus (recognizing that a foreign decree may not be collaterally attacked or disregarded unless it was rendered by a state without personal or subject-matter jurisdiction under the foreign state's internal law.)

Appellants' first, second, and fifth assignments of error have merit. Our resolution of these assignments of error renders any analysis with respect to appellants' remaining assignments of error moot pursuant to App.R. 12(A)(1)(c) and, therefore, need not be addressed.

The judgment of the trial court is reversed and judgment is entered in favor of appellants. Costs are assessed to appellees.

CHRISTLEY, P.J., concurs in judgment only,

NADER, J., concurs.

Ohio App. 11 Dist.,1999. In re Asente

END OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH DISTRICT COURT OF APPEALS OF OHIO

Roger Dale Juntunen Pro Se 649 Lloyd Street Hubbard, Ohio 44425 (330) 534-8948